No. 91-1406

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IN THE

Supreme Court of the United States

October Term, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals, relying primarily upon its interpretation of *Leedom v. Kyne* (358 U.S. 184), properly affirmed an injunction against ongoing proceedings before the National Railroad Adjustment Board (NRAB), prior to final NRAB action and outside the statutory procedure for review of NRAB orders, on the ground the NRAB lacks jurisdiction over the matter and where the rail carrier sought to avoid the time, effort, and money of the NRAB proceeding.

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Petitioner, American Train Dispatchers Association, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-13a), is reported at *Southern Ry. Co. v. American Train Dispatchers Assn.*, 948 F.2d 887.

The opinion of the district court (App. C, 16a-27a) is not reported.

JURISDICTION

The opinion of the court of appeals (App. A, 1a-13a), along with the judgment, were entered November 1, 1991. The petition for rehearing and suggestion en banc, were denied by the court of appeals (App. B, 14a-15a) on December 2, 1991.

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1), 2101(c).

STATUTES INVOLVED

The statutes primarily involved are 45 U.S.C. § 152, Ninth, and 45 U.S.C. § 153, First (h), (i) and (q).

UNITED STATES CODE (1988 Ed.)
TITLE 45 — § 152

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names

of their duly designated and authorized representatives in such a manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided —

* * * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

* * * * *

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-

car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the

parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

STATEMENT OF THE CASE

1. Statutory Background.

The National Railroad Adjustment Board (NRAB) is a federal agency, located at Chicago, Illinois, established under the Railway Labor Act (RLA), 45 U.S.C. 153, First, which is authorized to resolve disputes between employees and rail carriers growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. (App. C, 19a). 45 U.S.C. 153, First (i):

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute.

The NRAB is divided into four divisions, of which the third division has jurisdiction over disputes involving train dispatchers. 45 U.S.C. 153, First (h). The division issues its awards in writing, by majority vote, which may include provisions for the payment of money. 45 U.S.C. 153, First (m), (n), (o).

If an employee or a carrier is aggrieved by an award, a petition for review may be filed in the district court. The findings and order of the division shall be conclusive, except that the order may be set aside on several named grounds, one of which is lack of jurisdiction. 45 U.S.C. 153, First (q):

> . . . On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside. . . for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or . . .

The Supreme Court in a series of cases has ruled that the primary jurisdiction of the NRAB should not be frustrated by premature judicial action. Challenges to the NRAB's jurisdiction can be made after the NRAB has issued a final order. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 373-74 (1955); *Transportation Union v. U.P.R. Co.*, 385 U.S. 157, 164 (1966). The courts are not to interfere in NRAB proceedings. *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239 (1950); *Order of Conductors v. Pitney*, 326 U.S. 561 (1946).

2. The Adjustment Board Proceeding.

This case involves a proceeding pending at the NRAB. American Train Dispatchers Association (ATDA) is a national collective-bargaining representative for persons employed as

train dispatchers by most of the nation's major rail carriers, including train dispatchers employed by Norfolk Southern Railway Company (Southern).[1] ATDA and Southern are parties to a long-standing national agreement, entered into May 27, 1937, as revised May 30, 1979, known as the "37/79 Agreement." The agreement requires that positions be properly classified, *e.g.*, "Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Commerce Commission in its Order. . .shall be properly classified." (App. A, 5a).[2]

ATDA complained to Southern that some positions classified by Southern as "Superintendent, Transportation-Locomotive" (STL) at Southern's Atlanta Control Center were incorrectly classified, and should properly be classified as "Assistant Chief," "Night Chief," or "Chief Train Dispatcher." When Southern refused to reclassify the STL positions, ATDA appealed to a standing joint labor-management committee (Joint Committee), which has been established by ATDA and the rail carriers under the 37/79 Agreement. However, Southern objected to ATDA's appeal, asserting the Joint Committee lacked jurisdiction under the 37/79 Agreement to decide ATDA's appeal. (App. A, 4a).

ATDA thereupon invoked the jurisdiction of the NRAB in its contract dispute with Southern as to the authority of the Joint Committee to hear ATDA's appeal under the 37/79 Agreement. Southern countered with its action in the district court to enjoin the NRAB proceedings, "on the grounds that

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[1]Southern Railway Company, appellee below, changed its name in 1991 to the present Norfolk Southern Railway Company.

[2]For a reported decision involving the 37/79 Agreement and a different rail carrier, *see: CSX Transportation v. Train Dispatchers*, 126 LRRM 3021 (M.D. Fla. 1987).

the Adjustment Board was without statutory authorization to decide the matter." (App. A, 5a). Meanwhile, the NRAB proceeding continued to completion of ATDA and Southern submissions, and awaited assignment to a neutral for decision. (App. C, 19a).

3. District Court Decision.

The district court, in its unreported decision and judgment, enjoined ATDA from proceeding further at the NRAB to determine the juridiction of the Joint Committee to hear ATDA's appeal, and ordered that ATDA take steps to withdraw its dispute with Southern from the NRAB. (App. D, 28a-29a).

ATDA in the district court challenged Southern's right to judicial relief prior to a NRAB decision, pointing out that the NRAB's decision will be subject to judicial review. (App. C, 25a-26a). The court said it could decide, prior to arbitration, whether a dispute is arbitrable, citing *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986) and *Air Line Pilots Intern. v. Delta Air Lines*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. den.* 110 S.Ct. 79 (1989). (App. C, 26a).

The district court ruled that the matter before the NRAB was a "representation" dispute, cognizable before the National Mediation Board (NMB), and that it would violate the Railway Labor Act for any question affecting the representation of Southern's STLs to be decided by any agency other than NMB. (App. C, 26a). The district court gave two principal reasons. First, the district court stated that if ATDA ultimately was successful in having the 13 STL positions reclassified as dispatcher positions, ATDA will have 13 more positions added to the reach of its representation. The reclassified STL positions, according to the district court, would be filled by Southern, so that Southern would be free to permit the current STLs to remain in their positions, albeit

as train dispatchers subject to ATDA dues and the ATDA-Southern schedule agreement. (App. C, 24a).

Second, the district court also found the dispute to be a "representation" matter on the asserted ground the 37/79 Agreement permits the Joint Committee to decide only complaints involving the working conditions of train dispatchers, so that the NRAB would be required to decide whether the STLs are train dispatchers, and thus within the scope of ATDA's representation. (App. A, 6a-7a; App. C, 24a).

ATDA steadfastly denied it is seeking to represent the STLs; rather, ATDA maintains it is asserting its appeal to the Joint Committee on behalf of the train dispatchers it already represents, and to see that the work is given to train dispatchers. (App. C, 23a-24a).

4. Court of Appeals Decision.

The court of appeals affirmed the district court, but upon somewhat different grounds. On the authority of the district court to enjoin the NRAB's proceeding, the court of appeals recognized that the statutory scheme of the Railway Labor Act and the administrative law doctrine of primary jurisdiction ordinarily preclude review of the NRAB proceedings at this stage. (App. A, 11a). However, the court of appeals asserted the instant case falls with the exception of *Leedom v. Kyne*, 358 U.S. 184 (1958), as acknowledged in *Champion International Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988). The court of appeals stated that the district court did possess jurisdiction for the purpose of determining whether the NRAB could be exceeding its statutory authority in considering ATDA's claim, and that the district court in so doing was acting within its subject matter jurisdiction. (App. A, 12a):

> Thus, we acknowledged the very narrow exception that "the district court had subject matter jurisdiction

> to entertain the suit under *Leedom v. Kyne*, 358 U.S. 184 (1958), to the extent that it properly inquired whether the EPA had exceeded its delegated authority." *Champion*, 850 F.2d at 185-86. Applying this exception here, we find that the district court did possess jurisdiction, but only for the narrow purpose of determining whether the Adjustment Board would be exceeding its statutory authority in considering the Union's claim. The district court decided only this issue, and so we conclude that it was acting within its subject matter jurisdiction.

The court of appeals expressly did not review the district court's reliance upon asserted power of a court to make a threshhold inquiry as to arbitrability of a matter pending at the NRAB. (App. A, 12a n. 14).[3]

The court of appeals found that Southern is seeking to avoid the dedication of time, effort, and money to a NRAB proceeding that is manifestly beyond the jurisdiction of the agency. (App. A, 13a).

On the merits, the court of appeals found, contrary to the district court, that there is a controversy as to who would fill the former STL positions in the event the positions are classified as train dispatcher positions. (App. A, 9a). However, the court of appeals stated that ATDA's explanation of how the former STL positions would be filled demonstrates the existence of a representation dispute. (App. A, 9a).

The court reasoned that since ATDA stated that the former STL positions would be filled by employees holding seniority

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[3]Although NRAB proceedings have been termed "compulsory arbitration," the so-called arbitration is a mandatory statutory adjustment process, without an agreement to arbitrate. See: *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 36-38 (1957).

as train dispatchers, with the STLs ousted from their positions, the ATDA "will acquire 13 new positions." (App. A, 10a).

The court of appeals interpreted the 37/79 Agreement in important respects. The court said the agreement requires as a prerequisite to Joint Committee jurisdiction that the dispute involve the "working conditions of train dispatchers." However, the court disagreed with ATDA's reading of the 37/79 Agreement that "working conditions of train dispatchers" necessary to invoke jurisdiction under the 37/79 Agreement carries no necessary implication regarding the eventual disposition of the NRAB proceeding, because proper "classification" of Southern positions is a "working condition" of all present train dispatchers. The court of appeals interpreted the "working conditions of train dispatchers" prerequisite for ATDA's complaint is not satisfied because ATDA's complaint involves work being performed by existing STLs. (App. A, 10a):

> The agreement requires, as a prerequisite to Committee jurisdiction, that the dispute brought before the Committee concern the "working conditions of train dispatchers." Determining whether this prerequisite has been met in this case would require the Adjustment Board to decide whether the dispute is one over the working conditions of dispatchers, that class of employees which the Union represents. The Union argues that the dispute is one that concerns solely the working conditions of *existing* train dispatchers and "has no necessary implication regarding the STL positions." This argument ignores the facts. It is the work currently being performed by the STLs that the Union wishes to have reclassified, not work being performed by existing dispatchers. Further, it is the wages, benefits, and responsibilities

> of STLs that the Union seeks to change by reclassification; the Union does not seek changes in the manner in which existing dispatchers are treated.

The court of appeals considered it to be most important that the current STLs right to a job is directly threatened by ATDA's request for reclassification. (App. 10a). The court of appeals concluded that the dispute is a "representation" dispute and must be submitted to the National Mediation Board (NMB). (App. A, 11a).

ATDA's petition for rehearing, and suggestion for rehearing en banc, was denied on December 2, 1991. (App. B, 14a-15a).

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the orderly processing of so-called "minor disputes" at the National Railroad Adjustment Board (NRAB). The court of appeals has usurped the jurisdiction of that federal agency, prior to agency decision, in a manner which conflicts with heretofore settled opinions of this Court, and with that of the 10th Circuit.

I. THE DECISIONS OF THE SUPREME COURT REQUIRE THAT SOUTHERN EXHAUST THE PROCEDURES OF THE ADJUSTMENT BOARD PRIOR TO CHALLENGING THE BOARD'S JURISDICTION.

It has long been settled that the primary jurisdiction of the National Railroad Adjustment Board cannot be frustrated by premature judicial action. In *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366 (1955), a dispute arose between one union and the carrier concerning the latter's employment of a

member of another union in a position which the first union claimed under its collective bargaining agreement — a "scope rule" dispute. Rather than await final NRAB decision, the railroad sought injunctive relief in a district court to restrain further NRAB proceedings, alleging irreparable injury in being required to devote time and money to what it deemed an invalid NRAB proceeding.

The Supreme Court ruled that the inevitable result of injunctive relief would be to disrupt the NRAB's proceeding. 349 U.S. at 373:

> Railroad's resort to the court has preceded any award, and one may be rendered which could occasion no possible injury to it. The inevitable result is to disrupt the proceedings of the Board. Its decision has already been delayed for more than two years.

Further, the Supreme Court ruled that the possibility of needless expense incident to the NRAB proceeding is an inadequate basis for judicial intervention. 349 U.S. at 373-74:

> Moreover, among the injuries asserted by Railroad, only the possibility that it is being put to needless expense incident to the pending Board proceeding will necessarily be involved if judicial relief is denied at this stage of the administrative process. Such expense is inadequate basis for intervention whether by mandamus or injunction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Utah Fuel Co. v. Coal Comm'n*, 306 U.S. 56.

See also: Transportation Union v. U.P.R. Co., 385 U.S. 157, 164 (1966):

> ...the primary jurisdiction of the Adjustment Board could not be frustrated by premature judicial action.

The courts are not to interfere in NRAB proceedings. *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239 (1950); *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

The action of the district court below, affirmed by the court of appeals, in enjoining the NRAB proceedings, even prior to issuance of any NRAB order, runs counter to the entire history of the Supreme Court's rulings involving the NRAB.

1. Jurisdictional Challenges.

The court of appeals relied upon *Leedom v. Kyne* 358 U.S. 184 (1958), as applied by the court of appeals in a situation where injunctive relief was denied, *Champion Intern. Corp. v. U.S. E.P.A.*, 850 F.2d 182 (4th Cir. 1988), as authorizing its exception to the rule that precludes review of NRAB proceedings prior to final agency decision. (App. A, 11a-12a). This exception is claimed to be that the NRAB would be exceeding its statutory authority if it considered ATDA's claim. (App. A, 12a).

The court of appeals erred in adopting such an expansive view of *Leedom v. Kyne, supra*. There would not be a denial of anyone's rights, or irreparable injury, prior to final NRAB action. The *status quo* is preserved. Moreover, there is no concession the NRAB lacks jurisdiction over ATDA's claim, unlike *Leedom*.[4] However, there must be real present and immediate injury in order to invoke the *Leedom* exception. In addition to injury, the agency order must be made in excess of its jurisdiction and contrary to *a specific prohibition in the Act. Railway Clerks v. Employees Assn.*, 380 U.S. 650, 659-60 (1965). Further, *Leedom* involved solely the construction of

[4]Southern did not invite the views of either the NRAB or the National Mediation Board in either the district court or court of appeals.

a statute, not a factual dispute over the terms of an agreement. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

Clearly, there must be more than the mere claim of lack of jurisdiction to allow an action seeking to enjoin an agency proceeding prior to final decision. Yet the basis for the court of appeals' decision is predicated solely upon jurisdictional grounds, absent any specific statutory prohibition, injury, or concession by the NRAB. Indeed, there is a specific statutory provisions *permitting* judicial review on jurisdictional grounds after final agency decision. 45 U.S.C. 153 First (q).

Accordingly, the court of appeals was incorrect in relying upon *Leedom*, to upset orderly review of a NRAB award. There is nothing in *Champion* to suggest a revision of *Leedom*, and such revision by a court of appeals would be improper in any event.[5]

2. Irreparable Injury.

There is no showing of irreparable harm to Southern if it is required to await final NRAB action prior to challenging NRAB jurisdiction. The only injury found by the court of appeals to Southern would be the time and expense of litigation. (App. A, 13a):

> Here, Southern is acting on its own behalf to be released from an improper assertion of jurisdiction by an agency. Further, Southern is seeking to avoid the dedication of time, effort, and money to a proceeding that is manifestly byond the jurisdiction of the agency hearing it.

However, as already indicated, time and expense of litigation

[5]The holding in *Champion* is limited. *See: State of Okl. v. E.P.A.*, 908 F.2d 595, 602-3 n.6 (10th Cir. 1990).

are insufficient reasons to disrupt the NRAB process. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. at 373-74. *See also: FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242-43 (1980).

3. Interpretation of Agreements.

A critical contract interpretation made by the court of appeals was its interpretation of "working conditions of train dispatchers" contained in the 37/79 Agreement, *supra* 11-12. Paragraph 3 of the Agreement requires that positions be classified in accordance with the duties set forth in the Interstate Commerce Commissions's order. (App. A, 4a; App. C, 17a). Paragraph 4, followed by paragraph 5, authorizes complaints concerning "working conditions of train dispatchers." (App. A, 4a; App. C, 17a-18a). It follows that "proper classification" of positions on Southern is a "working condition" of existing train dispatchers. *See:* Declaration of Robert J. Irvin, para. 9(b). This interpretation was confirmed by Special Board of Adjustment No. 800 on June 4, 1973.[6]

The error of the court of appeals was to make any interpretation at all regarding the 37/79 Agreement, particularly since Southern and ATDA were in disagreement. It is settled by the decisions of the Supreme Court that courts, state and federal, are without authority to interpret agreements in the railroad industry between carriers and employees, for the jurisdiction of the NRAB to interpret these contracts is "exclusive" *Order of Conductors v. Pitney*, 326 U.S. 561, 565-66 (1946); *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 244-45 (1950).

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[6]Joint Committee Docket No. 76, John H. Dorsey, Chairman. The decision is of record. *See:* JA 84, 100-103.

The court of appeals compounded its error in considering this to be a "representation" dispute involving whether an employee desires to be represented by a labor organization (App. A, 11a). The court opined that those persons occupying present STL positions should have an opportunity to determine whether they want ATDA representation. (App. A, 10a). The court misapprehends the "representation" scheme under the Railway Labor Act, which differs significantly from that under the Labor Management Relations Act. Whereas the National Labor Relations Board determines the "appropriate bargaining unit," the rail industry is governed by the "craft or class." ATDA is the certified representative for the "craft or class" of train dispatcher.

Contrary to the court of appeals, a bona fide representation dispute exists only when there is a question of who shall be the representative of an entire "craft or class" of employees. Such a question is not present here. Individual employees, such as the incumbents of the present STL positions, cannot determine whether or not they wish to be represented by a union, as an additional part of an existing "craft or class." 45 U.S.C. 152 Fourth.

The fact that STL jobs may be directly threatened by ATDA's request for reclassification, does not create a "representation" dispute subject to NMB jurisdiction.

It is important that the Supreme Court correct the so-called "representation" concept advanced by the court of appeals, particularly so that the misinterpretation is not repeated.

II. THE OPINION OF THE FOURTH CIRCUIT IS CONTRARY TO THE DECISION OF THE TENTH CIRCUIT.

The opinion of the court of appeals below is contrary to the decision in *Brotherhood of Locomotive Eng. v. Denver & R.G.W. R. Co.*, 411 F.2d 1115 (10th Cir. 1969). In the Tenth Circuit case, it was a railway labor union that sought to enjoin hearings before a special adjustment board established under 45 U.S.C. 153, Second, of the Railway Labor Act.

The Tenth Circuit in affirming the district court's denial of injunctive relief, stated that the courts should not interfere in the adjustment board process unless the lack of jurisdiction is clear *and* the exercise of board jurisdiction would leave the party without remedy. The Tenth Circuit cited several of the leading Supreme Court cases in support of its ruling. 411 F.2d at 1117:

> The Railroad and the N.M.B. chose to take no part in the appeal, leaving the Firemen's Union as the only answering Appellee. No question of judicial review is raised on appeal. But we should not exercise our injunctive power to interfere with the establishment of the special board and the execise of its jurisdiction unless it is made to appear that the invocation of the board was clearly unauthorized and that the exercise of subject matter jurisdiction would leave the Appellant without remedy. *Transportation-Communication Emp. Union v. U.P.R. Co.*, 385 U.S. 157, 164 (1966); *Whitehouse v. Illinois Cent. R. Co.*, 349 U.S. 366 (1955), and cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938). Reviewing the trial court's declination to interfere with the administrative processes in this context, we affirm its judgment.

The courts of appeals for the fourth and tenth circuits are in conflict, which argues strongly for resolution by the Supreme Court.

III. THE OPINION OF THE FOURTH CIRCUIT INTERFERES WITH THE ORDERLY RESOLUTION OF CLASSIFICATION DISPUTES.

The opinion of the court of appeals is being utilized by the management of other carriers, in addition to Southern, to disrupt and to delay the proper classification of positions.

The 37/79 Agreement is national in scope, and not confined to Southern. Accordingly, carriers such as Chicago and Illinois Midland Railway Company, and Duluth, Messabi and Iron Range Railway Company, similarly are resisting proceedings for the proper classification of positions, giving as their reason the opinion below. ATDA anticipates that other carriers may follow this course. The result would be to impair the smooth working of labor relations for train dispatchers in the railroad industry, to the detriment of morale and the maintenance of an adequate and efficient transportation system. *Cf., United States v. Lowden,* 308 U.S. 225, 235-39 (1939).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals in this case.

Respectfully Submitted,

GORDON P. MacDOUGALL
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Attorney for Petitioner

March 2, 1992

APPENDIX A
PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SOUTHERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Defendant-Appellant.

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Amicus Curiae.

No. 90-2013

SOUTHERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Defendant-Appellant.

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Amicus Curiae.

No. 90-2018

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge.
(CA-89-2123-7-3)

Argued: October 30, 1990

Decided: November 1, 1991

Before RUSSELL and MURNAGHAN, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Murnaghan and Senior Judge Young joined.

COUNSEL

ARGUED: Gordon Pier MacDougall, Washington, D.C., for Appellant. Richard Edelman, HIGHSAW, MAHONEY & CLARKE, P.C., Washington, D.C., for Amicus Curiae. Jeffrey Stephen Berlin, RICHARDSON, BERLIN & MORVILLO, Washington, D.C., for Appellee. **ON BRIEF:** Jefferson V. Smith, Jr., CARTER, SMITH, MERRIAM, ROGERS & TRAXLER, Greenville, South Carolina, for Appellant. John O'B. Clarke, Jr., HIGHSAW, MAHONEY & CLARKE, P.C., Washington, D.C., for Amicus Curiae. Gregory W. Stevens, RICHARDSON, BERLIN & MORVILLO, Washington, D.C.; Frank H. Gibbes, III, RAINEY, BRITTON, GIBBES & CLARKSON, P.A., Greenville, South Carolina; William P. Stallsmith, Jr., Norfolk, Virginia, for Appellee.

OPINION

RUSSELL, Circuit Judge:

This suit was filed by appellee Southern Railway Company ("Southern") to enjoin the American Train Dispatchers' Association ("Union") from pursuing resolution of a dispute before the National Railroad Adjustment Board ("Adjustment Board"). Southern asserted that, under the Railway Labor Act ("RLA") the matter submitted to the Adjustment Board had been committed to the exclusive jurisdiction of another board, the National Mediation Board ("Mediation Board"). The district court held in favor of Southern, concluding that the Adjustment Board was without statutory authority to decide the

dispute submitted to it by the Union. The court issued a permanent injunction requiring the Union to withdraw the matter from the Adjustment Board. We affirm.

I.

This case arises at a time in the railroad industry when railroad labor unions are seeing, on a nation-wide basis, continually decreasing memberships. One of these unions, the American Train Dispatchers' Association, has decided to assert a claim that certain management positions at the Atlanta, Georgia, station of Southern Railway have been wrongly classified.[1] These positions, designated "Superintendents, Transportation-Locomotive" ("STL"), had been classified as management positions for nearly a quarter of a century by the time the Union brought its reclassification request. As managers, the STLs are not represented by any labor organization, and their work is not subject to a collective bargaining agreement. The Union, however, now seeks to have the classification of these positions changed to dispatcher. The result would be that the current STLs, to continue performing the same work, would be required to become dispatchers. The eligibility of these employees to continue working in the STL positions would be determined according to their seniority as established under a collective bargaining agreement known as the "Schedule Agreement."[2]

In attempting to have the positions reclassified, the Union has exercised rights and procedures set forth in another collective bargaining agreement, entitled the "National Agreement of May 27, 1937, as revised May 30, 1979." The agreement, to which both the Union and Southern are parties,[3] is generally known as the "37/79 Agreement."

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[1]Southern's records indicate that the only other request by the Union to reclassify the STLs as train dispatchers was asserted in 1985; however, the request was withdrawn, "without prejudice," shortly after it was made. The complaint at issue in the present case was filed with Southern on March 14, 1988.

[2]Article 4, ¶ e of the Schedule Agreement provides that, "In filling positions covered by this agreement, ability being sufficient, . . . seniority as train dispatcher shall govern."

[3]A number of carriers in addition to Southern are also signatories to this agreement.

Certain provisions of the 37/79 Agreement provide a framework whereby railroad employees can seek resolution of matters relating to their working conditions. Specifically, paragraph four of the Agreement provides that "[a]ny Train Dispatcher shall have the right to bring to the attention of the management, directly or through his designated and authorized representative, any conditions or practices . . . involving working conditions of train dispatchers." Under the Agreement, the dispatchers are to make their initial complaints directly to their employers. If a dispatcher is unsatisfied with the result of this direct complaint, the Agreement provides a procedure under which the dispatcher can appeal the complaint to a joint labor-management committee ("the Joint Committee"). The Joint Committee consists of three train dispatcher representatives and three railroad representatives, each with equal voting power.

Consistent with the procedures set forth in the 37/79 Agreement, the Union first submitted its request for reclassification directly to Southern. In its complaint, the Union quoted paragraph three of the Agreement, which provides: "Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Commerce Commission in its Order . . . shall be properly classified." The Union's complaint stated, "Pursuant to the provisions of such paragraph (3), this is to request that the following positions be properly classified: 'Superintendent, Transportation-Locomotive, Atlanta Control Center.'"[4] Southern reviewed the complaint, but refused to reclassify the STL positions.

The Union then proceeded to the next step outlined in the 37/79 Agreement, submission of an appeal of Southern's decision to the Joint Committee. Southern objected to submission of the appeal to the Committee on grounds that the Committee lacked jurisdiction to decide the appeal. Under the 37/79 Agreement, the Committee has jurisdiction only to decide disputes brought by or on behalf of dispatchers. Southern argued that the dispute raised by the Union, however, was on behalf of the STLs, who are not dispatchers. Southern

[4]Specifically, the Union requested that the positions be "classified as Assistant Chief, Night Chief, or Chief Train Dispatcher." These titles are found in the Interstate Commerce Commission ("ICC") order referred to in paragraph three of the 37/79 Agreement.

sent a letter to the Chairman of the Joint Committee, stating that "Southern has never agreed, in the National Agreement or elsewhere, to empower the Joint Committee to resolve any questions pertaining to Southern's employment of STLs."[5]

Rather than await a determination by the Joint Committee on Southern's jurisdictional challenge, the Union withdrew its complaint, "without prejudice," and submitted the question of the Joint Committee's jurisdiction to the National Railroad Adjustment Board. The action with the Adjustment Board was initiated by the Union's filing of a "notice of intent to file an *ex parte* submission," pursuant to Section 3, First, of the Railway Labor Act, 45 U.S.C. § 153, First. Southern then filed this civil action in district court, seeking to enjoin the Union from going forward in the Adjustment Board proceeding on the grounds that the Adjustment Board was without statutory authorization to decide the matter.

Unlike other labor statutes, such as the National Labor Relations Act, the Railway Labor Act divides authority for resolving disputes between two different national Boards.[6] Those disputes classified as "representation disputes" are to be decided by the National Mediation Board, 45 U.S.C. § 152, Ninth, while those disputes classified as "minor disputes" are to be decided by the National Railroad Adjustment Board. *See* 45 U.S.C. § 153, First, (i). By specifically assigning certain types of disputes to different Boards, the Act grants authority which is separate and exclusive. Neither Board is granted authority in the Act to decide disputes that have been committed to the jurisdiction of the other Board. Southern asserted before the district court that the matter submitted by the Union to the Adjustment Board is a representation dispute, the type of dispute which only the National Media-

[5]Letter from R.S. Spenski, of Southern, to E.S. McKeown, Chairman of the Joint Committee (Oct. 12, 1988).

[6]The Act also allows invocation of Special Boards or Emergency Boards in limited circumstances, but those boards, unlike the national boards, are temporary. *See* Railway Labor Act, § 10, 45 U.S.C. § 160 (discussing emergency boards); *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 303 (1989) (discussing special boards established by agreement of the employer and the unions).

tion Board has authority to decide. Thus, Southern argued, the Adjustment Board is without jurisdiction to hear the matter.

In characterizing the matter as a representation dispute, Southern asserted in its complaint that, to have standing to bring an action affecting the STLs, the Union must be found to be a representative of the STLs. Deciding this question, whether the Union is the representative of the STLs, would obviously involve the Adjustment Board in a representation dispute. The Union's response to this argument was that it was bringing the action on behalf of existing dispatchers. Thus, the Union argued, deciding whether the Joint Committee has jurisdiction merely required that provisions of the 37/79 Agreement be interpreted and enforced, making the dispute a "minor dispute," one properly before the Adjustment Board.

The parties filed cross-motions for summary judgment. After hearing oral argument on the motions, the district court found that the matter which the Union had submitted to the Adjustment Board was a representation dispute. The court so concluded for two reasons. First, and most obvious, if the Union is successful in having the thirteen STL positions reclassified as dispatcher positions, the Union will have added those thirteen positions to the reach of its representation. Based on evidence offered by Southern, the district court concluded that the newly reclassified STL positions would be filled by Southern, meaning that Southern would be free to allow the current STLs to remain in their original positions. These thirteen incumbents would become, upon reclassification, train dispatchers, subject to the requirement of paying Union dues and subject to the procedure for bidding for jobs under the seniority provisions of the Schedule Agreement.

Second, the 37/79 Agreement allows the Committee to decide only those complaints involving the "working conditions of train dispatchers." Thus, to resolve the question of the Joint Committee's jurisdiction, the Adjustment Board would be required to decide whether the complaint regarding the *STLs* stated a claim regarding the "working conditions of dispatchers." In deciding this question, the Adjustment Board would be determining whether the STLs are dispatchers and so within the scope of the Union's representation. Therefore, the court held, the dispute was outside the jurisdiction of the Adjustment Board

because the dispute was a representation dispute, one that the Railway Labor Act required to be resolved by the National Mediation Board. The court permanently enjoined the Union from pursuing the dispute before the Adjustment Board and required the Union to withdraw the matter.

The Union appeals, arguing that the matter submitted to the Adjustment Board was not a representation dispute, but a "minor dispute." The Union also challenges the district court's subject matter jurisdiction to intervene in the Adjustment Board proceeding, and asserts that Southern lacked standing to seek judicial relief.

II.

Disputes under the Railway Labor Act are of two kinds: those concerning the terms of collective bargaining agreements, and those concerning the proper representative for a group of employees. Disputes of the first type, those concerning the terms of collective bargaining agreements, are divided into the subcategories "major disputes" and "minor disputes." Disputes of the second type are called "representation disputes." The parties agree that a major dispute is not involved here, leaving only the question of whether the dispute submitted by the Union is a minor dispute or a representation dispute. Minor disputes arise "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153, First, (i). Such disputes are of a type that they "may be conclusively resolved by interpreting [an] existing agreement." *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 305 (1989). Representation disputes involve determinations as to whether a particular labor organization is, or should be, the representative of particular employees for purposes of collective bargaining. 45 U.S.C. § 152, Ninth. If, however, a dispute involves an overlap between a minor dispute and a representation dispute, the matter is to be resolved exclusively by the National Mediation Board. *Independent Union of Flight Attendants v. Pan American World Airways*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130, 131 (2d Cir. 1988) ("We affirm for substantially the reasons stated by the district court."); *see also Flight Engineers' International Association v. Pan American World Airways*, 896 F.2d 672, 673 (2d Cir.), *cert. denied*, 110 S. Ct. 2220 (1990).

Proper classification is important because the Act assigns disputes to the jurisdiction of different Boards depending on the nature of the dispute. If a dispute is a minor dispute, it is to be submitted to the Adjustment Board.[7] If a dispute is a representation dispute, it must be submitted to the National Mediation Board.[8] Because each of the two Boards is specifically assigned a certain type of dispute, the jurisdiction of each Board to hear the dispute assigned to it is separate and exclusive. The Adjustment Board is not empowered by the statute to hear representation disputes, and the Mediation Board lacks the statutory authority to hear minor disputes.[9]

Here, the Union has submitted to the Adjustment Board a dispute that is plainly a representation dispute. Before the Union filed its complaint in 1988, the STLs had worked as management employees for over twenty-three years and were never subject to a collective bargaining agreement. During that time, no one had questioned their status as management employees, and there had been no attempt by the Union to seek to represent them.[10] But now, in a time of dwindling Union memberships and loss of dispatcher positions, the Union has suddenly decided that the STL positions should be reclassified. The reclassification that the Union seeks would change the designation of these positions from management to dispatcher and, accordingly, would make available to the Union's existing members opportunities for new positions. It is clear from these facts that at the heart of the Union's reclassification request lies a representation dispute.

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[7]If the parties so choose, however, the dispute can be decided by a special adjustment board "established by the employer and the unions representing the employees." *Consolidated Rail*, 491 U.S. at 303-04.

[8]The National Mediation Board also has some authority over "major disputes." *See Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987).

[9]The only exception is that the Mediation Board is granted authority to determine one kind of minor dispute. If called upon by a party, the Mediation Board may interpret "any agreement reached through mediation." *Consolidated Rail*, 491 U.S. at 304 n.4.

[10]The only exception was a request by the Union to have the position reclassified in 1985; as noted *supra*, the request was withdrawn shortly after it was submitted.

The Union contends that the dispute is not a representation dispute and attacks the reasoning of the district court which led to a conclusion otherwise. The Union's argument is based on a dispute over who would fill the STL positions if the positions were reclassified. Specifically, the Union criticizes the district court's finding that, if the positions were reclassified, Southern would be free to fill the positions as it chose, even if that meant allowing the current employees working as STLs to retain their positions. The Union disagrees with this finding on the basis of the collective bargaining agreement known as the "Schedule Agreement." The Union asserts that, upon reclassification, the current employees would be "ousted" from their STL positions and replaced with existing dispatchers. Thus, the Union argues, it would not be adding a single new member. Instead, the Union would merely be shifting existing members to different jobs. The Union would still be representing exactly as many train dispatchers after reclassification as it did before reclassification.

Who would fill the STL positions in the event of reclassification is not clear. The district court accepted as "uncontroverted" Southern's statement that the current employees serving as STLs could continue to work as STLs. However, contrary to the district court's characterization of the matter as uncontroverted, the question of who would fill the positions upon reclassification *has* been disputed by the Union. The Union contends that the STL positions, once classified as "dispatcher" positions, would "be filled by employees holding seniority as train dispatcher."[11] The current STLs, who are not dispatchers, would then be ousted from their jobs to make the positions available to existing dispatchers. We conclude that the Union's explanation of how the STL positions would be filled demonstrates the existence of a representation dispute.[12]

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[11]Second Declaration of Robert J. Irvin ¶ 5.

[12]Under the explanation offered by Southern and accepted by the district court, seniority would not apply such that the current STLs would be ousted from their positions. Southern's argument was that, under its interpretation of the Schedule Agreement, the positions would be filled according to seniority at the location in question. However, Southern currently has no dispatchers with seniority that would apply to the Atlanta Control Center. With no eligible dispatchers for that location, Southern would be able to fill the jobs with whoever it chose, including the current STLs, even though they would be at the bottom of the seniority list as newly classified dispatchers. Certainly, under this scenario, the Union would acquire additional members within the scope of its representation, the incumbent STLs.

Assuming the Union is correct, and the current STLs are ousted, the Union will acquire thirteen new positions. The skills that the STLs will retain from their former jobs will now fall under the category of "dispatcher." Thus, if the STLs want to work in positions using the skills acquired as STLs, they must become dispatchers. Upon becoming dispatchers, they will fall within the scope of the Union's representation. However, as new members, it seems that they would come in at the bottom of the seniority list and, thus, lose their current jobs. Where there is such a direct threat to the jobs of the STLs, these employees should be allowed the opportunity to determine whether they want to be represented by the Union.

The Union also argues that, even though the issue the Union placed before the Joint Committee concerned reclassification, the issue before the Adjustment Board has nothing to do with reclassification. The sole issue before the Adjustment Board is whether the Joint Committee has jurisdiction. To answer this question the Board need merely construe the 37/79 Agreement, a task which does *not*, according to the Union, implicate a representation dispute. We disagree.

The agreement requires, as a prerequisite to Committee jurisdiction, that the dispute brought before the Committee concern the "working conditions of train dispatchers." Determining whether this prerequisite has been met in this case would require the Adjustment Board to decide whether the dispute is one over the working conditions of dispatchers, that class of employees which the Union represents. The Union argues that the dispute is one that concerns solely the working conditions of *existing* train dispatchers and "has no necessary implication regarding the STL positions." This argument ignores the facts. It is the work currently being performed by the STLs that the Union wishes to have reclassified, not work being performed by existing dispatchers. Further, it is the wages, benefits, and responsibilities of STLs that the Union seeks to change by reclassification; the Union does not seek changes in the manner in which existing dispatchers are treated. Most important, it is the current STLs continued right to a job that is directly threatened by the Union's request for reclassification.

Finally, the Union asserts that the dispute is actually a minor dispute, one within the statutory authority of the Adjustment Board,

because determining the Joint Committee's jurisdiction merely requires interpretation of the terms of the 37/79 Agreement. We find this argument to be completely without merit. While interpretation of the Agreement may be involved, the dispute clearly implicates representation concerns. It has been established that when a minor dispute and a representation dispute overlap, the matter should go before the Mediation Board. *Flight Engineers' International Association*, 896 F.2d at 673; *Independent Union of Flight Attendants*, 664 F. Supp. at 158.

Where the true nature of the dispute is so plain, we can see no reason to delay submission to the Board specifically empowered to hear the dispute. The dispute is a representation dispute and, as such, must be submitted to the National Mediation Board.

III.

The Union raises arguments challenging the district court's jurisdiction to decide this case and attacking Southern's standing to bring this action in district court. We find these arguments to be without merit.

First, the Union argues that "the district court has usurped the statutory scheme for testing the jurisdiction of the National Railroad Adjustment Board." The Railway Labor Act expressly allows review of assertions that the Adjustment Board lacked jurisdiction, but only after the Board has rendered a final decision. Thus, according to the Union, the RLA precludes an assertion of jurisdiction by a federal court prior to a final decision by the Adjustment Board. The Union also asserts that the administrative law doctrine of "primary jurisdiction" precludes judicial review at this stage of the Adjustment Board proceeding. While we agree that these arguments would generally preclude review of actions by the Adjustment Board, we find that this case falls within an exception.

In *Champion International Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988), we resolved the very issue that has been presented to us here. In that case, the EPA made arguments similar to those advanced by the Union in the present case. First, the EPA argued "that since it has only assumed issuing authority over Champion's permit and has not

made any final determination either to issue or to deny a permit, jurisdiction in this case has been specifically limited by statute." *Id.* at 187. Second, the EPA argued "that review is precluded by the related judicial doctrines of exhaustion of administrative remedies, ripeness, and finality." *Id.* We agreed with the EPA that, generally, the effect of applying either the statutory scheme for review or the administrative law doctrines would be to "place Champion out of court." *Id.* at 188. We recognized that there was, however, an alternative left to Champion, the argument "that the action of the EPA was so outside its statutory authority that the district court was justified in interrupting agency action." *Id.* Thus, we acknowledged the very narrow exception that "the district court had subject matter jurisdiction to entertain the suit under *Leedom v. Kyne*, 358 U.S. 184 (1958), to the extent that it properly inquired whether the EPA had exceeded its delegated authority." *Champion*, 850 F.2d at 185-86. Applying this exception here, we find that the district court did possess jurisdiction, but only for the narrow purpose of determining whether the Adjustment Board would be exceeding its statutory authority in considering the Union's claim.[13] The district court decided only this issue, and so we conclude that it was acting within its subject matter jurisdiction.[14]

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[13]We find our earlier decision in *South Carolina State Ports Authority v. NLRB*, 914 F.2d 49 (4th Cir. 1990), to be distinguishable. The statute involved in that case, the National Labor Relations Act, empowers only one national board to resolve disputes, the NLRB. There, it was clear that the NLRB had jurisdiction to hear the type of dispute submitted. The only question was whether one of the parties was properly before the Board. Here, the statute involved, the RLA, assigns different types of disputes to two different national boards with separate and exclusive jurisdiction. Unlike *South Carolina State Ports Authority*, it is clear in the instant case that the board attempting to assert jurisdiction is without authority to hear the *type* of dispute that has been submitted to it.

[14]The Union argues that the decisions in *AT&T Technologies v. Communication Workers*, 475 U.S.-643 (1986), and *Air Line Pilots International v. Delta Air Lines*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 79 (1989), relied upon by the district court, "do not support the District Court's preemptive threshold inquiry into the NRAB's jurisdiction in a proceeding brought under 45 U.S.C. § 153, First." We do not address this contention, having found the district court's intervention in the Adjustment Board proceeding amply supported by the decision of this Court in *Champion*.

Second, the Union raises, by means of an *amicus* brief of the Railway Labor Executives' Association ("RLEA"), the argument that Southern lacks standing to present this case to the district court. Standing is allegedly absent because Southern is attempting to assert the rights of third parties, the STLs. According to the RLEA, Southern is faced with no injury in being required to appear before the Adjustment Board. The only persons with any potential injury are the STLs, who have not been joined in the proceeding but whose rights may nevertheless be decided in their absence. Thus, the RLEA asserts, Southern's challenge to the Adjustment Board's jurisdiction is really a challenge on behalf of a third party, the STLs. We disagree.

The narrow issue raised in the district court was whether the Adjustment Board was acting outside its authority in asserting jurisdiction over a matter to which Southern was made a party. It would be anomalous to follow a rule that would allow an agency's statutory authority to be challenged, but would deny a party to that dispute standing to raise the issue. Here, Southern is acting on its own behalf in seeking to be released from an improper assertion of jurisdiction by an agency. Further, Southern is seeking to avoid the dedication of time, effort, and money to a proceeding that is manifestly beyond the jurisdiction of the agency hearing it. We find that Southern has standing.

IV.

For the foregoing reasons, we conclude that the matter raised before the Adjustment Board was a representation dispute, that the court did have jurisdiction to determine whether the agency had clearly exceeded its powers, and that Southern had standing to bring the action in federal district court. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED
December 2, 1991

No. 90-2013
CA-89-2123-7-3

SOUTHERN RAILWAY COMPANY
Plaintiff-Appellee

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION
Defendant-Appellant

RAILWAY LABOR EXECUTIVES ASSOCIATION
Amicus Curiae

No. 90-2018
CA-89-2123-7-3

SOUTHERN RAILWAY COMPANY
Plaintiff-Appellee

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION
Defendant-Appellant

RAILWAY LABOR EXECUTIVES ASSOCIATION
Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member

of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

JOHN M. GREACEN

Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

FILED
JAN 10 1990
ANN A. BIRCH
CLERK
US DISTRICT COURT
ENTERED
1-10-90

Civil Action No. 7:89-2123-3

SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on cross-motions for summary judgment. For the reasons set forth below, the Court will grant the motion of plaintiff Southern Railway Company ("Southern") for summary judgment and will deny the motion of defendant American Train Dispatchers Association ("ATDA").

Facts

Southern operates a railroad system in the southeastern and south central United States. Southern is a "carrier" for purposes of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Southern is a subsidiary of the Norfolk Southern Corporation, which also controls other railroads. ATDA is a labor organization that represents Southern employees who are in the "craft or class" of train dispatchers, for purposes of collective bargaining under the Railway labor Act, 45 U.S.C. § 151 Sixth, § 152 Fourth. Train dispatcher work on Southern is performed in accordance with the provisions of a collective bargaining

agreement, known as the "schedule agreement," to which Southern and ATDA are parties.

Southern and ATDA are engaged in a dispute involving thirteen Southern employees who work in Atlanta, Georgia, and are known as "Superintendents, Transportation-Locomotive" ("STLs"). The STLs are management employees who are not represented by a labor union; they do not work under a collective bargaining agreement. The STLs are responsible for "distribution of power," which consists of assigning locomotives to trains and particular facilities throughout the Norfolk Southern railroad system. Southern has used nonunion STLs to perform its power distribution work since 1965.

Southern and ATDA are parties to a national agreement, to which many of the nation's larger railroads are also parties. This national agreement was first entered into on May 27, 1937 and was revised on May 30, 1979; it is commonly called the "37/79 Agreement." The 37/79 Agreement provides in paragraph 3 that:

> Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Commerce Commission in its Order, generally known as the "Occupational Classification," effective July 1, 1921, or as such Order has been or hereafter may be amended, shall be properly classified.

The agreement also provides, in paragraph 4, that:

> Any Train Dispatcher shall have the right to bring to the attention of the management, directly or through his designated and authorized representative, any conditions or practices involving safety in train dispatchers service, or involving working conditions of train dispatchers not covered by ex-

> isting agreements or agreements that may hereafter be negotiated between railroads and train dispatchers.[1]

The 37/79 Agreement establishes a procedure for the consideration of complaints brought under paragraph 4. If a train dispatcher's complaint is not satisfactorily resolved by the railroad, it may be appealed to a "Joint Committee" established under the agreement. The Joint Committee consists of three train dispatcher representatives and three railroad representatives. The Joint Committee, or a subcommittee established by it, investigates disputes, conducts hearings, makes findings, and attempts to resolve disputes submitted to it. In the event of a deadlock on the Joint Committee, the president of ATDA and the chairman of the National Railway Labor Conference, a trade association of railroads, attempt to dispose of the case or determine a proper way to break the deadlock.

On March 14, 1988, *twenty-three years* after Southern began using nonunion STLs to perform power distribution work, the ATDA general chairman for Southern's train dispatchers wrote to Southern, invoking paragraph 3 of the 37/79 Agreement and requesting that Southern's STLs be reclassified as train dispatchers, because in ATDA's view the STLs were performing duties of train dispatchers. After conferring with ATDA, Southern declined the request. By letter of September 20, 1988, ATDA then sought to bring its complaint before the Joint Committee. The chairman of the Joint Committee, who was an ATDA official,[2] accepted the complaint. Southern, however, objected to consideration of the complaint by the

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[1]Paragraph 4 also lists 13 subjects as to which complaints may be made. Among them are: adequate work force, number of rest days, privacy and elimination of noise, ventilation, and proximity of wash rooms.

[2]The chairmanship of the Joint Committee rotates between ATDA and railroad representatives. In 1988, ATDA held the position.

Joint Committee; Southern argued that the Joint Committee has jurisdiction to investigate only complaints that are brought by or on behalf of train dispatchers and, because the STLs are not train dispatchers, the Joint Committee lacks jurisdiction to consider a complaint presented on their behalf. ATDA withdrew its complaint from the Joint Committee by letter of December 28, 1988.

On July 7, 1989, ATDA filed with the Third Division of the National Railroad Adjustment Board ("NRAB") a "notice of intent to file an *ex parte* submission." The NRAB is a federal agency, located in Chicago and established under the Railway Labor Act, 45 U.S.C. § 153 First, that presides over the arbitration of disputes involving the interpretation or application of collective bargaining agreements in the railroad industry. ATDA's notice proposed that the NRAB decide the following question:

> Does the Joint Committee created under the provisions of the National Agreement dated May 30, 1979 (amending the May 27, 1937 National Agreement) between railroads represented by the NATIONAL CARRIERS' CONFERENCE COMMITTEE and employees of such railroads represented by the AMERICAN TRAIN DISPATCHERS ASSOCIATION, have jurisdiction to consider an appeal of the complaint concerning proper classification of positions presently designated Superintendent, Transportation-Locomotive, dated March 14, 1988?

ATDA's notice intitiated an arbitration proceeding at the NRAB. The NRAB case is headed toward an eventual hearing before a neutral referee. The NRAB has no procedure that allows for a threshold determination as to jurisdiction. Therefore, as a result of ATDA's filing its notice, Southern became obligated, as far as the NRAB was concerned, to participate in the arbitration proceeding.

Southern then filed this civil action on August 24, 1989, invoking jurisdiction under the Railway Labor Act; 28 U.S.C. § 1331 and § 1337; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Southern alleged in its complaint that in submitting to the NRAB the question whether the Joint Committee has jurisdiction over a complaint supposedly asserted on behalf of Southern's STLs, ATDA was seeking to have the NRAB determine whether ATDA has standing to represent the STLs — *i.e.*, whether ATDA represents the STLs under the Railway Labor Act. This, contends Southern, amounted to asking the NRAB to decide a representation dispute.

Southern contends that, under the Railway Labor Act, 45 U.S.C. § 152 Ninth, representation disputes are exclusively within the jurisdiction of the National Mediation Board ("NMB"), a different federal agency. Section 152 Ninth provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the [National] Mediation Board, upon request of either party to the dispute to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

Southern argues that the NRAB therefore has no authority to decide the question submitted to it by ATDA. Southern asks for a judgment declaring that the NMB has exclusive jurisdiction to resolve the question whether Southern's STLs should be brought within the scope of ATDA's representation, and that the NRAB has no authority to decide that question.

Southern also seeks a permanent injunction enjoining ATDA from prosecuting before NRAB the dispute over whether the Joint Committee has jurisdiction to consider the appeal of ATDA's complaint concerning the classification of STL positions.

Although the facts are not in dispute, ATDA takes a very different view of them. ATDA admits that it does not now represent Southern's STLs and denies that it seeks to represent them. ATDA says it is not involved in a representation dispute with Southern concerning those employees; rather, ATDA says it only wants to take the STLs' work away from them and make it available to train dispatchers whom ATDA already represents.

ATDA also contends that in filing its original complaint with the Joint Committee, it was merely seeking to obtain enforcement of paragraph 3 of the 37/79 Agreement, which states that train dispatcher positions shall be properly classified; in submitting its question to the NRAB, ATDA says, it was making use of the arbitration remedy which, under 45 U.S.C. § 153 First (i), is available for questions of contract interpretation. ATDA argues that its dispute with Southern concerns the interpretation and application of the 37/79 Agreement and therefore it is not a representation dispute but a "minor dispute" which, under the Railway Labor Act, must be arbitrated.

Southern moved for a preliminary injunction to prevent ATDA from going forward with its NRAB proceeding. ATDA responded to that motion, and also answered the complaint and moved for summary judgment on Southern's claims. Southern also moved for summary judgment. The matter came on for hearing before the Court on December 20, 1989. The parties agreed that the case was ripe for summary judgment in that no material facts are in dispute and the only questions presented are questions of law. Southern agreed that, as both parties had moved for summary judgment, it was unnecessary

for the Court to consider the request for the grant of preliminary injunctive relief. In deciding the cross-motions for summary judgment, the Court has considered all evidentiary materials on file, including the declarations of Robert S. Spenski and Mark R. MacMahon (submitted by Southern) and Robert J. Irvin (submitted by ATDA).

Discussion

Because the material facts are not in dispute, it is appropriate for this case to be decided by summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

A.

It is well established that there are three kinds of disputes that may arise under the Railway Labor Act, and that the statute provides a distinct and separate mechanism for the handling of each type.

"Representation disputes" involve determinations as to whether a particular labor organization is, or should be, the representative of particular employees for purposes of collective bargaining. A representation dispute may exist even if only one union is involved. *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988) ("*IUFA v. Pan AM*"). The NMB's jurisdiction over representation disputes is exclusive. 45 U.S.C. § 152 Ninth; *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 336 (1943); *Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17, 19 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962).

"Minor disputes' arise "out of grievances or out of the interpretation or application of agreements concerning rates of

pay, rules, or working conditions." 45 U.S.C. § 153 First (i). Arbitration of minor disputes is compulsory. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S. Ct. 2477, 2480 (1989) ("*Conrail v. RLEA*"). However, when a single case involves an overlap between a representation dispute and a minor dispute, the matter must be resolved exclusively by the NMB, regardless of whether arbitrable issues are involved. *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *Flight Engineers' International Association, PAA Chapter v. Pan American World Airways, Inc.*, 716 F. Supp. 110 (S.D.N.Y. 1989); *IUFA v. Pan AM*, 664 F. Supp. at 159.

Finally, "major disputes" concern the formation or alteration of labor agreements; they seek to create new contractual rights. *Conrail v. RLEA*, 109 S. Ct. at 2480. Major disputes are, ultimately, left to the parties themselves to resolve. The parties here agree that this case does not present a major dispute.

The Court concludes that the matter that the ATDA has put before the NRAB is, at its core, a representation dispute.

The question posed by ATDA for arbitration necessarily requires the NRAB to decide whether Southern's STLs are within the "craft or class" of train dispatchers, for which ATDA is the bargaining representative. To be cognizable under paragraph 4 of the 37/79 Agreement, a complaint must be made by a train dispatcher and must involve the working conditions of train dispatchers. In disputing the Joint Committee's jurisdiction to hear ATDA's complaint, Southern has denied that the complaint satisfies either requirement. ATDA is necessarily asking the NRAB to rule that the complaint satisfies both.

ATDA steadfastly denies that it is seeking to represent the STLs. Rather, ATDA contends that it is asserting its Joint

Committee complaint on behalf of the train dispatchers that it *already* represents, in that it is seeking to take the STLs' work away from them and see that the work is given to train dispatchers; indeed ATDA wants to see the STLs "ousted from their positions." Defendant's Memorandum in Support of Motion for Summary Judgment at 8. The uncontroverted evidence, however, shows that if ATDA were to prevail in its complaint before the Joint Committee and succeed in having the STL positions reclassified as train dispatcher jobs, the result would simply be the addition of thirteen positions (those occupied by the STLs) to the scope of ATDA's representation. The current train dispatchers would not necessarily benefit at all; Southern would not be obligated, under its schedule agreement with ATDA, to fire the STLs or turn their work over to the current train dispatchers. The occupants of the STL jobs would, however, undeniably become unionized train dispatchers. MacMahon Declaration at paras. 4-10.

For the same reason, a determination that ATDA's Joint Committee claim involves the working conditions of train dispatcher would necessarily imply a decision that the current STL jobs are, or should be, within the scope of the craft or class of train dispatcher, which ATDA represents.

The Court is not undertaking to render a definitive interpretation of the meaning of paragraph 3 or paragraph 4 of the 37/79 Agreement, or to define the extent of the Joint Committee's jurisdiction. The Court must, however, determine what the consequences would likely be of a ruling *by the NRAB* on the particular question of Joint Committee jurisdiction that ATDA has submitted for arbitration. The conclusion is inescapable that the NRAB's ruling would have the effect of deciding whether ATDA has representative status with respect to the occupants of what are now STL jobs. The NRAB has no proper role in making such a decision.

B.

ATDA argues that even if this case does involve a representation dispute, the Court should dismiss Southern's complaint because the "rule is 'hands off' if a representational dispute comes before the Court." Memorandum of Defendant in Opposition to Motion for a Preliminary Injunction at 6. It is certainly true that the Court would have no business *deciding* a representation dispute. *Order of Railroad Telegraphers v. Leighty; IUFA v. Pan Am.* The Court is persuaded, however, that it is appropriate for the judiciary to defend the Railway Labor Act scheme that assigns different types of disputes to different agencies. The courts have to make determinations about the extent of the NMB's exclusive jurisdiction in order to protect that jurisdiction. *See, e.g, Order of Railroad Telegraphers v. Leighty.* The injunction power is properly used to require the parties to disputes — whether carriers or labor organizations — to follow the procedures set forth in the statute. *Summit Airlines, Inc. v. Teamsters Local Union 295,* 628 F.2d 787 (2d Cir. 1980)[3]

ATDA also argues that Southern should be denied relief in this civil action, in any event, because the NRAB's decision will be subject to review in a future civil action that either party may bring in a United States District Court under 45 U.S.C. § 153 First (q).[4] That argument ignores the principale that the courts should defend the Railway Labor Act's scheme by preventing the resolution of a representation dispute by the

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[3]The federal courts are empowered to grant injunctive relief "to vindicate the processes of the Railway Labor Act." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957).

[4]The scope of review under this provisions is "among the narrowest known to the law." *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970).

wrong body. Even where a case involves elements of a minor dispute, the matter is still exclusively for the NMB to resolve where employees have a representational stake in the resolution of the dispute. *IUFA v. Pan Am*, 664 F. Supp. at 159. The NMB's exclusive jurisdiction would not be well protected if nothing could be done until after a representation matter had been decided by another agency. *See also AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 640 (1986) (courts decide, prior to arbitration, whether disputes are arbitrable); *Air Line Pilots Association v. Delta Air Lines, Inc.*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 79 (1989).[5]

It is especially appropriate to protect the NMB's exclusive jurisdiction in this case, and to act before rather than after the NRAB has ruled, for the thirteen current STLs are not parties to the NRAB arbitration proceeding and have no voice before that agency. Only in a proceeding before the NMB would the STLs be able to express their own views as to whether or not they wish to be represented by the ATDA.

The Court has considered all the other arguments advanced by ATDA and has found them to be without merit.

C.

The Court finds that it would violate the Railway Labor Act for any question affecting the representation of Southern's STLs to be decided by any agency other than the NMB. The case that ATDA has presented to the NRAB inevitably calls for a determination that will affect the question of the STLs'

[5]ATDA cites cases holding that the jurisdiction of the NRAB should not be frustrated by premature judicial action. *E.g., Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 373-74 (1955). Those cases are inapposite, because if a matter is within the exclusive jurisdiction of the NMB, it is not properly befor ethe NRAB in the first place.

representation. Accordingly, it violates the Railway Labor Act for ATDA to pursue its arbitration case before the NRAB.

For these reasons, the Court concludes that Southern is entitled to a judgment as a matter of law. The Court will grant the declaratory relief requested by Southern. The Court finds that the NMB has exclusive jurisdiction to resolve the question whether Southern's STLs should be brought within the scope of ATDA's representation; the NRAB has no authority to decide that question.

Injunctive relief is also appropriate. ATDA shall be premanently enjoined from prosecuting before the NRAB the dispute over whether the Joint Committee has jurisdiction to consider the appeal of ATDA's complaint concerning the classification of STL positions. ATDA must withdraw its pending NRAB case. If ATDA has an interest in obtaining representative status with respect to Southern's STLs, ATDA will have to submit the matter to the NMB in accordance with the procedures of the Railway Labor Act.

Accordingly, IT IS ORDERED that:

1. The motion of plaintiff Southern Railway Company for summary judgment is GRANTED.

2. The motion of defendant American Train Dispatchers Association for summary judgment is DENIED.

3. Defendant American Train Dispatchers Association is directed to take all steps necessary, forthwith, to withdraw from the National Railroad Adjustment Board the pending case concerning the Joint Committee's jurisdiction.

G. Ross Anderson, Jr.
United States District Judge

Dated: January 9th, 1990

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA SPARTANBURG DIVISION

FILED
JAN 16 1990
ANN A. BIRCH, CLERK
U.S. DISTRICT COURT
ENTERED
1-16-90

Civil Action
No. 7:89-2123-3

SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,

Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable G. Ross Anderson, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, and plaintiff's motion for summary judgment having been granted,

IT IS ORDERED, ADJUDGED, and DECREED:

That the National Mediation Board has exclusive jurisdiction to resolve the question whether employees of plaintiff Southern Railway Company known as Superintendents, Transportation-Locomotive should be brought within the scope of representation of defendant American Train Dispatchers Association;

That the National Railroad Adjustment Board has no authority to decide the foregoing question;

That defendant American Train Dispatchers Association is permanently enjoined from prosecuting before the National Railroad Adjustment Board the dispute over whether the Joint Committee established under the National Agreement of May 30, 1979 (amending the agreement of May 27, 1937) has jurisdiction to consider the appeal of the American Train Dispatchers Association's complaint concerning the classification of Superintendents, Transportation-Locomotive positions; and

That defendant American Train Dispatchers Association shall take all steps necessary to withdraw the foregoing dispute from the National Railroad Adjustment Board.

Dated at Greenville, South Carolina, this 11th day of January, 1990.

ANN A. BIRCH, CLERK
By: Carolyn Moss
Deputy Clerk

FORM APPROVED:
G. Ross Anderson, Jr.

G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 2 1992
OFFICE OF THE CLERK

(2)

No. 91-1406

IN THE

Supreme Court of the United States

October Term, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF

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Supreme Court of the United States

October Term, 1991

No. 91-1406

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF

Petitioner submits this supplemental brief to call attention to a recent opinion by this Court, issued December 3, 1991, subsequent to the denial of rehearing below. Rule 15.7.[1]

In *Board of Governors v. MCorp.*, 112 S.Ct. 459 (Nos. 90-913 & 90-914), the Court confirmed that *Leedom v. Kyne*, 358 U.S. 184 (1958), is not a broad license to enjoin on-going administrative proceedings where there exists meaningful and

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[1]Although decided prior to the filing of the petition for writ of certiorari, counsel was unaware of the opinion until today, as he had not seen it in the traditional reporter tracking system.

adequate means for vindicating claimed rights. 112 S.Ct. at 465-66.[2]

Petitioner suggests the present posture of the *Leedom v. Kyne* exception — an exception which formed the basis for the decision below — strongly argues for summary disposition and remand in light of *Board of Governors v. MCorp.*

Respectfully submitted,

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MARCH 31, 1992

[2]Although there is not an express statutory preclusion of injunctive actions which interfere with National Railroad Adjustment Board proceedings, such preclusion is implied from long-standing decisions of this Court. (Pet. 12-13). Moreover, preclusion most likely is not a requirement in this situation. *See:* Funk, William, *Administrative Law News (Supreme Court News)*, Vol. 17, No. 3, at p. 5 (ABA, Chicago, IL, Spring 1992).

Supreme Court, U.S.
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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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April 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether, under the Railway Labor Act, a labor union may compel a railroad to arbitrate a claim before the National Railroad Adjustment Board when deciding the claim would require that board to resolve a question—whether the union represents certain of the railroad's employees—that is within the exclusive jurisdiction of the National Mediation Board.

LIST OF PARENT AND SUBSIDIARY COMPANIES

The common stock of respondent Norfolk Southern Railway Company (named "Southern Railway Company" until December 31, 1990) is wholly owned by Norfolk Southern Corporation, the stock of which is publicly held. The preferred stock of respondent Norfolk Southern Railway Company is publicly held. The subsidiaries of respondent, other than wholly owned subsidiaries, are:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Carolina Midland Railroad Company, The
South Western Rail Road Company, The
State University Railroad Company
Yadkin Railroad Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1406

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Norfolk Southern Railway Company ("Southern") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The November 1, 1991 decision of the court of appeals is reported at 948 F.2d 887 and is reproduced in the appendix to the petition ("Pet. App.") at 1a. The district court's January 10, 1990 memorandum and order is not reported and is reproduced in the

appendix to the petition at 16a. The district court's January 16, 1990 judgment, which was separately appealed, is not reported and is reproduced in the appendix to the petition at 28a.

JURISDICTION

The court of appeals entered its decision on November 1, 1991. The petition for rehearing and suggestion for rehearing en banc were denied by the court of appeals on December 2, 1991 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on March 2, 1992. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board

shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

The petition seeks review of a decision of the United States Court of Appeals for the Fourth Circuit affirming an order and judgment of the United States District Court for the District of South Carolina which granted the motion of respondent Southern for summary judgment, and denied the cross-motion of petitioner American Train Dispatchers Association ("ATDA") for summary judgment, on the civil action brought by Southern against ATDA. Southern operates an interstate railroad system throughout the southeastern, south central, and midwestern United

States.[1] ATDA, a labor union, is a representative of Southern's train dispatchers for purposes of collective bargaining under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*[2] ATDA had filed an arbitration case with the National Railroad Adjustment Board ("NRAB"), a federal agency that presides over the arbitration of labor agreement disputes under RLA § 3, 45 U.S.C. § 153. In its civil action, Southern had invoked RLA § 2 Ninth, 45 U.S.C. § 152 Ninth, seeking to require ATDA to withdraw its NRAB case on the ground that deciding that case would require the arbitration panel to decide whether the union represents certain employees *other* than train dispatchers, and that such a decision is within the exclusive jurisdiction of the National Mediation Board.

This case involves the interests of thirteen non-union, salaried, management employees of Southern known as "superintendents, transportation-locomotive" ("STLs"). These employees are not represented by ATDA or any other labor organization, and their work is not subject to any collective bargaining agreement. The STLs work in Southern's Atlanta, Georgia facility known as the Control Center and perform

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[1] Until December 31, 1990, Southern's name was "Southern Railway Company," which is the name that is used in the decisions of the courts below. The name change had no effect on any legal right or obligation of Southern.

[2] A "representative" under the RLA is "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." 45 U.S.C. § 151 Sixth. A union can become a representative of employees only through voluntary recognition by the carrier, or through the procedures established in RLA § 2 Ninth, 45 U.S.C. § 152 Ninth, for the certification of representatives by the National Mediation Board.

work known as "distribution of power"—the assignment of locomotives to particular trains and facilities—throughout Southern's railroad system. Southern has used management STLs to perform this work since 1965.[3]

As bargaining representative for Southern's employees in the "craft or class" of train dispatchers,[4] ATDA has negotiated with Southern a basic collective bargaining agreement known as the train dispatchers' "schedule agreement." That agreement provides a comprehensive set of wages, rules and working conditions for Southern's train dispatchers.

The schedule agreement provides ATDA with a procedure for claiming that power distribution work belongs to train dispatchers. Such a claim would be founded on the schedule agreement's "scope rule," which defines the work that train dispatchers are contractually entitled to perform. In a scope rule claim, ATDA would allege that Southern has been violating the schedule agreement by allowing persons who are not train dispatchers—the STLs—to perform power distribution work that assertedly is reserved to train dispatchers under the scope rule. In such a claim, the

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[3] The STLs are also the employees of Southern who were involved in *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991).

[4] RLA § 2 Fourth, 45 U.S.C. § 152 Fourth, provides that employees "shall have the right to organize and bargain with representatives of their own choosing" and that the majority of any "craft or class" shall have the right to determine the representative of that "craft or class." The term "craft or class" is used to define the bargaining unit designated by the Mediation Board in connection with an election of representatives.

relief sought would be to have train dispatchers paid as though they were performing the work that allegedly had been taken away from them in violation of the schedule agreement. ATDA has never brought such a claim since STLs began performing power distribution work in 1965.[5]

ATDA has instead taken a different tack, with a goal of obtaining something other than conventional scope rule relief. ATDA and Southern, along with many of the nation's larger railroads, are parties to another collective bargaining agreement, the National Agreement of May 27, 1937, as revised May 30, 1979 (generally known in the railroad industry as the "37/79 Agreement"). The 37/79 Agreement was intended to provide a means by which train dispatchers could raise with their employers concerns about the safety and working conditions of train dispatchers that are not addressed in the train dispatchers' schedule agreements on the separate railroads. Paragraph 4 of the 37/79 Agreement provides:

> Any Train Dispatcher shall have the right to bring to the attention of the management, directly or through his designated and authorized representative, any conditions or practices involving safety in train dispatchers service, or involving working conditions of train dispatchers not covered by existing agreements or agreements that may here-

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[5] In response to any such claim, Southern, of course, would dispute that the scope rule somehow gives train dispatchers a contractual entitlement to work that, with ATDA's acquiescence, train dispatchers have not performed in the lifetime of the schedule agreement.

> after be negotiated between railroads and train dispatchers.[6]

Under the procedure established by the 37/79 Agreement for the consideration of complaints brought under paragraph 4, a train dispatcher must first submit his complaint to the railroad, and then may appeal the matter to a labor-management "Joint Committee." The Joint Committee is not constituted as an arbitration panel; rather, it is composed of three carrier representatives and three representatives of ATDA, all of whom have equal voting power.

On March 14, 1988, ATDA's general chairman for Southern's train dispatchers filed a complaint with Southern, assertedly under the procedure of paragraph 4 of the 37/79 Agreement. In that complaint—filed nearly a quarter of a century after Southern began using STLs to perform distribution of power work—ATDA demanded that Southern reclassify and rename the STL positions as "Assistant Chief, Night Chief or Chief Train Dispatchers." The complaint cited paragraph 3 of the 37/79 Agreement, which states:

> Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Com-

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[6] Paragraph 4 lists thirteen subjects intended to fall within the scope of the Agreement: adequate force; rest days; extent of dispatching territory; number of communicating circuits; number of train sheets and train order books to be handled; use of train dispatching circuits; location of office at points where train dispatchers are employed; privacy and elimination of noise and interference; proper equipment and arrangement of office; lighting, heating, cooling, ventilation, etc.; proximity of wash rooms, toilets, etc.; proper drinking water conveniently located; and methods of recording motor and/or track car line-ups.

> merce Commission in its Order, generally known as the "Occupational Classification," effective July 1, 1921, or as such Order has been or hereafter may be amended, shall be properly classified.[7]

Southern declined the request, and ATDA sought to appeal its complaint to the Joint Committee. Southern took the position that the Joint Committee lacked jurisdiction to consider ATDA's complaint because the committee's jurisdiction is limited to the investigation of complaints brought by or on behalf of train dispatchers, and Southern's STLs, on whose behalf the complaint was brought, are not train dispatchers.

ATDA withdrew its appeal, "without prejudice," and then, on July 7, 1989, filed with the NRAB's Third Division, which has jurisdiction over arbitration cases involving train dispatchers, a "notice of intent

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[7] The Occupational Classification Order to which paragraph 3 refers describes the duties of train dispatchers and governs carriers "in the preparation and submission of their annual and other periodic reports to the Interstate Commerce Commission." 49 C.F.R. § 1245.1. The Occupational Classification Order divides train dispatchers into two groups or "grades." Grade 1 consists of the position of "Train Dispatcher" and includes employees who are primarily responsible for, or who supervise others who are primarily responsible for, the movement of trains by train orders. Grade 2 consists of the positions of "Assistant Chief Train Dispatcher" and "Chief Train Dispatcher." "Night Chief Train Dispatcher" is included in Grade 2 as an example of "Assistant Chief Train Dispatcher." Employees classified under Grade 2 are responsible for the movement of trains on a division or other assigned territory, involving the supervision of train dispatchers and other similar employees; the supervision of the handling of trains and the distribution of power and equipment incident thereto; and the performance of related work. *Id.*

to file an *ex parte* submission" with respect to the following claim:

> Does the Joint Committee created under the provisions of the National Agreement Dated May 30, 1979 (amending the May 27, 1937 National Agreement) between railroads represented by the NATIONAL CARRIERS' CONFERENCE COMMITTEE and employees of such railroads represented by the AMERICAN TRAIN DISPATCHERS ASSOCIATION, have jurisdiction to consider an appeal of the complaint concerning proper classification of positions presently designated Superintendent, Transportation-Locomotive, dated March 14, 1988?

Because the NRAB has no procedure that allows for a threshold determination as to jurisdiction, Southern therefore became obligated, as far as the NRAB was concerned, to participate in the arbitration proceeding on the merits of ATDA's claim.

Southern filed its civil action on August 24, 1989, seeking a judgment declaring that, under the RLA, the National Mediation Board, not the NRAB, has exclusive jurisdiction to resolve the question whether STLs should be brought within the craft or class of train dispatchers, and therefore within the scope of ATDA's representation; and, accordingly, that ATDA may not prosecute before the NRAB the dispute over whether the Joint Committee has jurisdiction to consider an appeal concerning proper classification of the STL positions. Southern also sought an injunction to prevent ATDA from prosecuting its claim before the wrong statutory forum.

On cross-motions for summary judgment, the district court held that deciding the claim ATDA had submitted to the NRAB for arbitration would require the NRAB to determine whether ATDA represents Southern's STLs under the RLA, and that such a determination is within the Mediation Board's exclusive jurisdiction. Pet. App. 23a, 27a, 28a. Invoking the rule that the federal courts are empowered to grant injunctive relief " 'to vindicate the processes of the Railway Labor Act,' " *id.* 25a n.3 (quoting *Bhd. of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957)), the district court enjoined ATDA from prosecuting before the NRAB the representation dispute over the reclassification of Southern's STLs. Pet. App. 27a, 29a.

The court of appeals affirmed, concluding that ATDA had sought to present a dispute to the NRAB for arbitration that "is plainly a representation dispute" subject to the Mediation Board's exclusive jurisdiction. Pet. App. 8a. The court determined that "the heart" of the union's claim before the NRAB was a representation dispute because reclassification of the STL positions from management to dispatcher would sweep those positions within the scope of the union's representation. *Id.* As a prerequisite to Joint Committee jurisdiction, the court explained, the 37/79 Agreement requires that a dispute concern the "working conditions of train dispatchers," and "[d]etermining whether this prerequisite has been met in this case would require the Adjustment Board to decide whether the dispute is one over the working conditions of dispatchers, that class of employees which the Union represents." *Id.* 10a. The court found that ATDA's assertion that the dispute concerned the

working conditions of *existing* train dispatchers "ignores the facts," because it is the work being performed by STLs, not current dispatchers, that ATDA wished to have reclassified, and it is the wages, benefits, and responsibilities of STLs, not current dispatchers, that the union sought to change through reclassification. *Id.*

The court of appeals concluded that, even if interpretation of the 37/79 Agreement was required, the dispute submitted by ATDA for arbitration was not a so-called "minor dispute" within the NRAB's jurisdiction,[8] because "the dispute clearly implicates representation concerns." Pet. App. 11a. The court explained that "[i]t has been established that when a minor dispute and a representation dispute overlap, the matter should go before the Mediation Board." *Id.* (citing *Flight Engineers' Int'l Ass'n v. Pan American World Airways, Inc.*, 896 F.2d 672, 673 (2d Cir.), *cert. denied*, 495 U.S. 953 (1990); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988)).

The court of appeals found no merit to the union's jurisdictional challenges to Southern's lawsuit. The court rejected ATDA's contention that, because the RLA permits review of NRAB decisions, the district court lacked jurisdiction to decide Southern's claim.

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[8] "Minor disputes" are those growing "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153 First (i). Minor disputes involve the enforcement of vested contract rights and "may be conclusively resolved by interpreting" existing agreements. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989).

The court reasoned that, under *Leedom v. Kyne*, 358 U.S. 184 (1958), and the Fourth Circuit's application of that decision in *Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988), the district court possessed jurisdiction to determine whether the NRAB would be exceeding its statutory authority in considering ATDA's arbitration case. The court of appeals concluded that the district court "was acting within its subject matter jurisdiction" because it decided only this issue. Pet. App. 12a.

Finally, the court of appeals also rejected a contention that Southern lacked standing to sue because assertedly only the interests of the STLs themselves were implicated in the dispute. The court held that Southern's standing was demonstrated by the fact that Southern was "acting on its own behalf in seeking to be released from an improper assertion of jurisdiction" by the NRAB and was "seeking to avoid the dedication of time, effort, and money to a proceeding that is manifestly beyond the jurisdiction of the agency hearing it." *Id.* 13a.

ARGUMENT

1. The court of appeals was plainly correct in determining that the dispute ATDA presented to the NRAB for arbitration was a representation dispute and therefore outside that board's jurisdiction. At its heart, ATDA's assertedly arbitrable question was *precisely* whether the union is to be treated as the RLA representative of Southern's STLs. The court of appeals rightly declined to allow ATDA to use its artificially cast arbitration proceeding to achieve this recognition, and made clear that if this union wishes to bring the STLs within the scope of its represen-

tation, it will have to attempt to do so by means of a properly instituted National Mediation Board proceeding.

The RLA, in § 2 Ninth, specifically assigns resolution of representation disputes solely to the Mediation Board. 45 U.S.C. § 152 Ninth. The jurisdiction of the Mediation Board is plenary and exclusive, *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 336 (1943)—so exclusive that its representation determinations are not ordinarily subject to judicial review, *Switchmen's Union of North America v. NMB*, 320 U.S. 297, 302 (1943); *Order of Railway Conductors v. Pennsylvania R.R.*, 323 U.S. 166 (1944).

There is no doubt that the Mediation Board's exclusive role in representation matters is central to this lawsuit, and to the decision of the court of appeals. RLA § 2 Ninth is " 'mandatory in form and capable of enforcement by judicial process.' " *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. at 331 (quoting *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 545 (1937)). The governing principle is that a party may not circumvent the Mediation Board's exclusive role by submitting an artfully contrived question to arbitration before a different agency and then asserting that the wrong agency's process must be allowed to operate to conclusion. The lower courts have consistently and without difficulty concluded that, to protect the Mediation Board's statutory jurisdiction, a union will not be allowed to use the wrong forum—whether a court[9]

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[9] *E.g., Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 162-63 (5th Cir. 1983); *Air Line Pilots Ass'n v.*

or an RLA arbitration board[10]—to resolve a claim which implicates representational concerns, even should the claim also involve contract interpretation. The decision of the court of appeals here raises no new issue.

ATDA's petition ignores all this. The union ignores the substance of the dispute it precipitated under the 37/79 Agreement. Instead, ATDA takes as given that its arbitration case raised merely a routine question of contract interpretation as to which the NRAB's jurisdiction would be paramount. The district court and the court of appeals, however, had no trouble understanding that what ATDA was seeking from the NRAB was an arbitration decision that would recognize the union's capacity as representative of Southern's STLs—and no difficulty concluding, in accordance with all the pertinent authorities, that any such use of the NRAB is impermissible. Pet. App. 8a, 10a, 23a-24a. This case therefore has nothing in common with cases, mistakenly relied on by ATDA, which establish the primacy of NRAB jurisdiction where it exists but do not involve representational concerns or the role of the Mediation Board, and

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Texas Int'l Airlines, Inc., 656 F.2d 16, 23-24 (2d Cir. 1981); *Bhd. of Locomotive Firemen & Enginemen v. Seaboard Coast Line R.R.*, 413 F.2d 19, 24 (5th Cir.), *cert. denied*, 396 U.S. 963 (1969); *Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17, 18-21 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962).

[10] *E.g.*, *Flight Engineers' Int'l Ass'n v. Pan American World Airways, Inc.*, 896 F.2d at 673; *Air Line Pilots Ass'n v. Delta Air Lines, Inc.*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 821 (1989); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. at 158, *aff'd*, 836 F.2d at 131.

which certainly do not counsel the courts to tolerate misuse of the arbitration forum.[11]

ATDA also misses the point when it asserts, Pet. 15-16, that the court of appeals' decision to bar the union from arbitrating its representation dispute somehow depended on that court's finding, Pet. App. 13a, that Southern has a legitimate interest in seeking to avoid being required to participate in an arbitration proceeding that lies outside the RLA structure. The passage cited by ATDA does not set forth the court of appeals' substantive reasons for affirming the issuance of injunctive relief. Rather, in that passage the court of appeals was rejecting a contention made

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[11] *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946) (court may not adjudicate dispute between two unions each claiming that certain work falls within the scope of its labor agreement); *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 240-41, 244-45 (1950) (state court may not resolve a jurisdictional dispute between two unions; noting that Court was "not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative," 339 U.S. at 244 n.7); *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955) (railroad may not obtain injunction against arbitration proceeding brought by one union on the ground that the dispute involves a conflict of two unions' jurisdictions and the absent union was indispensable to the resolution of the dispute); *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966) (NRAB decision declaring certain work to be within the scope of one union's labor agreement remanded, where NRAB had failed to consider the claim of another union which contended the work was covered by its own agreement).

Whitehouse, *Pitney*, and *Transportation-Communication Employees Union* involved conventional "scope rule" claims in which a union asserted a contractual entitlement to perform particular work. Here, ATDA has steadfastly avoided bringing a "scope rule" claim under its schedule agreement with Southern.

by *amicus* (not ATDA) that Southern lacked standing to sue. The court based its affirmance of the injunction against ATDA's pursuit of its case before the NRAB on the plain lack of NRAB jurisdiction under a statute which confers on the Mediation Board the exclusive power to decide representation disputes.[12]

Beyond this, when all else is said, it remains that the particular controversy that ATDA seeks to raise to this Court is an idiosyncratic one, dependent on the peculiar framework of the 37/79 Agreement, which affects only train dispatchers and has no parallel elsewhere in the railroad industry. No broad principle (other than preservation of the Mediation Board's function) is implicated by the court of appeals' decision that ATDA cannot obtain an arbitrator's determination as to whether the union may submit to the Joint Committee established under the 37/79 Agreement a claim on behalf of management STLs that involves those employees' working conditions.

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[12] No new issue is raised in ATDA's untimely "Supplemental Brief," which cites to a decision of this Court announced three months before the filing of the petition. ATDA contends that this case is somehow controlled by *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 112 S. Ct. 459 (1991), but the union continues not even to mention the exclusivity of the Mediation Board's jurisdiction over representation disputes, the foundation of the court of appeals' decision. Moreover, ATDA disregards the emphasis the *MCorp* Court placed on the fact that the statute there involved contained a provision which expressly denied the district court jurisdiction to enjoin proceedings before the agency in question. 112 S. Ct. at 466. No comparable provision is found in the RLA. To the contrary, it has long been settled that the RLA invests the Mediation Board with exclusive jurisdiction over representation disputes. It is that exclusivity which bars ATDA from submitting the dispute to the NRAB here.

2. There is certainly no relevant conflict among the circuits. ATDA is simply wrong in attempting, Pet. 18-19, to manufacture a conflict between the decision of the court of appeals here and the decision in *Bhd. of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969) ("*BLE v. DRGW*"). There, the Tenth Circuit refused to enjoin an arbitration proceeding when the arbitration board had been properly established pursuant to the RLA by a railroad and a union which *did* represent employees whose grievances were the subject of the arbitration.[13] The Tenth Circuit's decision merely confirms the primacy of arbitral jurisdiction *when it exists*; the decision does not address the Mediation Board's exclusive role in representation disputes, though it does counsel against misuse of the arbitral forum when jurisdiction is absent.[14]

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[13] A second union had sought to enjoin the arbitration proceeding on the ground that the arbitration board created by the railroad and the first union was not properly constituted because the grievances assertedly arose while the employees were performing work that was governed by the labor agreement between the railroad and the second union. The Tenth Circuit concluded that the board was properly established because, under the RLA, an individual may prosecute his or her grievance through any certified representative, not necessarily the collective bargaining representative. 411 F.2d at 1116-17.

[14] The dictum in *BLE v. DRGW* quoted by ATDA, Pet. 18—" 'we should not exercise our injunctive power . . . unless it is made to appear that the invocation of the board was clearly unauthorized and that the exercise of subject matter jurisdiction would leave the Appellant without a remedy' "—is fully consistent with the decision of the court of appeals in this case. ATDA is attempting to force arbitration of a dispute that is manifestly beyond the NRAB's jurisdiction, and after-the-fact judicial review would fail to protect the RLA's statutory scheme,

The court of appeals' decision in this case is fully consistent with the principle, uniformly recognized in the circuits, that the courts should act to protect the Mediation Board's exclusive jurisdiction when, as here, a union attempts to force the resolution of a representation dispute through *any means* other than submission of the matter to the Mediation Board under 45 U.S.C. § 152 Ninth.[15] The decision of the court of appeals is equally consistent with the District of Columbia Circuit's application, in the RLA context, of the principle of *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986), that courts are to determine arbitrability in the first instance.[16] And the court of appeals' decision is in line with decisions of the Second Circuit, not

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the interest of Southern in not being compelled to participate in the resolution of a representation dispute in the wrong statutory forum, and the interest of the current STLs in not having their representation decided in a forum in which they lack a voice.

[15] *See, e.g.*, cases cited in footnotes 9 & 10, above. *See also Railway Labor Executives' Ass'n v. Wheeling & Lake Erie Ry.*, 914 F.2d 53, 55-56 (4th Cir. 1990); *Scheduled Skyways, Inc. v. NMB*, 738 F.2d 339, 342 (8th Cir. 1984); *Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 794-95 (2d Cir. 1980); *Pan American World Airways, Inc. v. Int'l Bhd. of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd sub nom. Bhd. of Railway, Airline & Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969) (per curiam).

[16] *Air Line Pilots Ass'n v. Delta Air Lines, Inc.*, 863 F.2d at 91 (unless the collective bargaining agreement provides clear and unmistakable evidence of a contractual intent that the court be ousted of primary jurisdiction to determine arbitrability, the court, in the first instance, must determine whether a grievance is arbitrable and thus within the jurisdiction of an RLA board of adjustment).

cited by ATDA, holding that, under the RLA, arbitral jurisdiction yields to the Mediation Board's central role in supervising *all* matters pertaining to representation.[17] The lower courts have consistently and properly rejected attempts to divest the Mediation Board of its exclusive jurisdiction, whether by invoking arbitration or through other means.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[17] *Flight Engineers' Int'l Ass'n v. Pan American World Airways, Inc.*, 896 F.2d at 673 (refusing to order arbitration of an asserted RLA contract dispute because a decision on the contract issue would have "implicated representation concerns within the exclusive jurisdiction" of the Mediation Board); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. at 158, *aff'd*, 836 F.2d at 131 (same).

ATDA cannot legitimately distinguish the cases arising in the airline industry on the ground that arbitration boards in that industry are not directly established by the statute itself, as they are in the railroad industry, but are created by contract pursuant to the RLA. The duty to arbitrate minor disputes is as much a statutory mandate in the airline industry as it is in the railroad industry; the RLA commands the parties in the airline industry to establish arbitration boards to resolve disputes involving contract interpretation. 45 U.S.C. § 184. Consequently, the nature of the disputes that each forum can decide is the same in both industries.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

On March 2, 1992, petitioner American Train Dispatchers Association [hereinafter, "ATDA"] filed a petition with this Court seeking a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to enable this Court to review *Southern Ry. v. ATDA*, 948 F.2d 887. The Railway Labor Executives' Association [hereinafter, "RLEA"] has obtained the written consent of the parties to present this brief as an *amicus curiae*,[1] and respectfully submits this brief in support of the petition.

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[1] The separate, written consents of petitioner and respondent Norfolk Southern Railway Company [hereinafter, "NSR"] have been submitted with this brief in accordance with Rule 37.2 of the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

Amicus RLEA is a voluntary, unincorporated association of the chief executive officers of thirteen labor organizations, including petitioner ATDA, that collectively represent the majority of rail employees in this country.[2] RLEA was formed in 1926 to act as the spokesperson for its members on matters of common concern before the Congress, the courts (including this Court) and administrative agencies that affect rail employees. Indeed, RLEA supported the amendments to the Railway Labor Act that are at issue in this case, and then acted as the spokesperson for rail labor in 1934 when Congress considered that proposed legislation—*i.e.*, the creation of the National Railroad Adjustment Board [hereinafter, "NRAB"] and the vesting of jurisdiction in the National Mediation Board [hereinafter, "NMB"] to decide "representation disputes." As such, RLEA has an interest in assuring that the jurisdiction which the 1934 amendments to the Railway Labor Act gave to the NRAB and to the NMB are construed properly.

This case presents two issues that RLEA considers important to the orderly functioning of the Railway Labor Act. First, there is the threshold jurisdictional issue, whether the lower courts properly derailed the Act's minor dispute resolution processes in this case by enjoining petitioner ATDA from exercising its right under Section 3 First(i) of the Act, 45 U.S.C. § 153 First(i), to have the NRAB resolve a dispute that the ATDA claimed involved the interpretation of an agreement. This issue, *amicus* RLEA respectfully submits, turns on whether the court of appeals was correct in asserting that the rationale of *Leedom v. Kyne*, 358 U.S. 184 (1958), justified the district court's exercise of jurisdiction over the carrier's claim that the NRAB lacked

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[2] A list of RLEA's affiliated labor organizations is reproduced herein as Appendix A.

jurisdiction to consider the union's contract-interpretation claim. According to the appellate court, *Leedom* supported the district court's exercise of jurisdiction *before* the NRAB had the opportunity to consider its own jurisdiction, thereby bypassing the exclusive jurisdiction of the NRAB to resolve contract interpretation issues and the judicial review process established by Sections 3 First(p) and 3 First(q) of the Act, 45 U.S.C. §§ 153 First(p) and 153 First(q), to consider whether the NRAB has exceeded its jurisdiction. Prior decisions of this Court, *e.g.*, *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), and this Court's recent decision in *Board of Governors v. MCorp Financial, Inc.*, Nos. 90-913 and 90-914, decided December 3, 1991, establish that the lower courts erred in usurping the NRAB's jurisdiction. The second issue, which is fairly included in the question presented by the petition, is whether the lower courts were correct in concluding that the underlying controversy posed by the ATDA's submission to the NRAB raised a "representation dispute," rather than a contract interpretation issue as the ATDA maintains.

Amicus RLEA respectfully submits that both issues are important to rail labor because they involve the very practical problem of whether a carrier can rely upon the right that the Railway Labor Act gives *its employees* to select *their* representative, to refuse to resolve a dispute over whether that carrier has entered into a contract that gives the employees covered by that agreement the right to perform the disputed work. These controversies, which are currently called "jurisdictional" or "scope" disputes, are a form of dispute that has been around for years; they are common today and, indeed, were common in 1934 when the Act was amended as rail labor had requested. It is important to rail labor, the carriers and to the public that there be a mechanism in the Act to resolve the merits of these disputes, and until recently there was such a mechanism—the adjust-

ment boards. *E.g., Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966). To change this by relegating the union to an administrative tribunal—the NMB—that has no ability to resolve the underlying controversy, does not foster one of the stated purposes of the Act—*i.e.*, "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). Rather, it leaves the party asserting what are actually *contractual* rights without a meaningful and adequate means of vindicating those rights.

This case is an excellent example of this distortion of the Act's processes, for the lower courts have effectively left the ATDA without any method to resolve its claim that the work being performed by the NSR's "Superintendents, Transportation-Locomotive" [hereinafter, "STL"] was train dispatcher work that the carrier was obligated by contract to classify as dispatcher's work. Pet. App. at 17a-18a. Petitioner ATDA relied upon a contract that the carrier and our nation's major railroads had entered into with petitioner in 1937—*i.e.*, the "37/79" agreement—that gave the employees a right to have a "Joint Committee" (an adjustment board under Section 3 Second of the Act) investigate and resolve petitioner's claim that the carrier had improperly classified the disputed positions. Pet. App. at 18a. When the carrier objected to the submission of the union's classification claim to the Joint Committee because, the carrier asserted, STLs were not dispatchers and the 37/79 agreement applied only to the working conditions of "dispatchers" (Pet. App. at 19a), the ATDA invoked the jurisdiction of the NRAB to resolve the dispute raised by the carrier's interpretation of the 37/79 agreement as justifying its refusal to submit the classification dispute to the Joint Committee. *Id.* In other words, the union asked the

NRAB to decide whether the carrier was correct in construing the 37/79 agreement as not applying to the classification dispute.

Rather than defend its interpretation of the 37/79 agreement or challenge before the NRAB that tribunal's jurisdiction to resolve the dispute as presented to it by the ATDA, the carrier filed a suit in the United States District Court for the District of South Carolina. That suit sought an injunction to prevent the union from presenting its claim to the NRAB because, the carrier argued, the dispute, which the union claimed was a contract interpretation issue, was actually a dispute over whether the dispatchers represented the STLs—a "representation dispute" within the exclusive jurisdiction of the NMB under Section 2 Ninth of the Act, 45 U.S.C. § 152 Ninth. The district court concluded that it had jurisdiction to consider the carrier's challenge to the NRAB's jurisdiction and issued an injunction directing the ATDA to withdraw its dispute from the NRAB. Pet. App. at 28a-29a. That injunction was affirmed on appeal. Since there is no dispute among the carrier's employees as to whether the ATDA represents the craft or class of dispatchers on this carrier,[3] there is no dispute over which the NMB has jurisdiction under Section 2 Ninth, and there is, thus, no means within the ATDA's control to resolve the classification dispute.

Since RLEA's members are the individuals charged with the responsibility under the Railway Labor Act "to exert every reasonable effort . . . to settle all disputes, whether arising out of the application of . . . agreements or otherwise" (45 U.S.C. § 152 First), RLEA has a

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[3] Section 1206.2(a) of the NMB's regulations for the handling of representation disputes, 29 C.F.R. § 1206.2(a), provides that when a craft of employees are represented, a representation dispute will not be found by the NMB unless the applicant supports a representation application with "authorization cards" from "at least a majority of the craft or class . . . ."

very real and vital interest in assuring that the Act is properly construed so as to enable its members to settle jurisdictional disputes. It is for this reason that RLEA is submitting this brief in support of the petition.

SUMMARY OF ARGUMENT

This case presents important issues concerning the proper interpretation of the Railway Labor Act's dispute resolution processes that have been decided by the Fourth Circuit in a way that is in conflict with decisions of this Court in *Board of Governors v. MCorp Financial, Inc.*, Nos. 90-913 and 90-914, decided December 3, 1991, and *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955). In particular, the court of appeals has authorized the district courts to exercise jurisdiction over a suit by a railroad seeking to enjoin a union from invoking the jurisdiction of the NRAB under Section 3 First(i) of the Railway Labor Act to resolve a dispute that the union claims involves the interpretation and application of a collective bargaining agreement. This extraordinary relief was given to respondent because the lower courts, after considering the merits of the railroad's claim, concluded that the underlying controversy was a "representation dispute" within the exclusive jurisdiction of the NMB and outside the jurisdiction of the NRAB.

Amicus RLEA respectfully submits that this case presents important issues of federal law because the lower courts have interfered with the orderly and prompt resolution of a claim that an agreement subject to the Railway Labor Act gives one party to the dispute certain rights that the other party refuses to acknowledge. Congress, as this Court has noted many times before, "considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). But, according to the courts below, the federal courts can nevertheless intervene to disable a union

from using the adjustment board's processes if the carrier, relying on the rights of its employees under Section 2 Ninth, 45 U.S.C. § 152 Ninth, alleges that the underlying dispute may deprive unrepresented employees of their jobs because the NRAB may conclude that the carrier has agreed to give that work to represented employees. Such a dispute, the lower courts concluded, raises a "representation" dispute within the exclusive jurisdiction of the NMB under Section 2 Ninth. This ruling and similar ones by other courts of appeals expanding the scope of disputes subject to the NMB's jurisdiction, has the potential of emasculating the adjustment boards' exclusive jurisdiction to resolve contract based "jurisdictional/scope" disputes. Such a result would be contrary to earlier decisions of this Court, for this Court has previously recognized that the NRAB has the exclusive jurisdiction to decide contract based "jurisdictional" disputes. *E.g.*, *Transportation-Communications Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

Moreover, the court of appeals ruling giving the district courts the power to enjoin NRAB proceedings, *amicus* RLEA submits, is contrary to *Whitehouse* and *MCorp* because *Whitehouse*, when read in light of Sections 1 and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 107, shows that federal courts lack jurisdiction to interfere with the NAB's consideration of claims submitted to it. *Whitehouse* held that it is pure speculation to claim that a potential, but as yet unknown, NRAB ruling will harm the complainant, and that the Act's provisions for judicial review of an adverse NRAB decision eliminates any claim that such speculative harm will be irreparable. Nevertheless, the appellate court affirmed the injunction directing petitioner ATDA to withdraw its claim from the NRAB because the court of appeals concluded that this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), justified immediate judicial intervention to prevent the NRAB from exceeding its jurisdiction. The lower court's reliance on *Leedom v. Kyne* is, as this

Court's recent decision in *MCorp* shows, misplaced for there is no need to ignore Congress' carefully crafted scheme for the resolution of minor disputes, which provides for the judicial review of NRAB orders but only after the NRAB has exercised whatever jurisdiction Section 3 First(i) of the Act gives it to consider claims submitted to it. Since *McCorp* was decided approximately one month after the court of appeals issued its decision in this case, this Court should grant the petition, summarily reverse the court of appeals ruling and remand this case to that court for reconsideration in light of *MCorp.*

ARGUMENT

I. THIS CASE PRESENTS ISSUES THAT ARE IMPORTANT TO THE ORDERLY AND PROPER ADMINISTRATION OF THE RAILWAY LABOR ACT'S MINOR DISPUTE RESOLUTION PROCESSES

When Congress amended the Railway Labor Act in 1934 to correct some of the defects that had been detected in the 1926 Act, 44 Stat. 577 (1926), it established quasi-judicial, administrative tribunals to consider and decide at the request of either party to the dispute, any unresolved dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or wording conditions" that has been handled on the property "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . . ." 45 U.S.C. § 153 First(i). Congress gave those tribunals—the NRAB and adjustment boards established under Section 3 Second of the Act, 45 U.S.C. § 153 Second—exclusive jurisdiction over the unresolved contract interpretation disputes—*i.e.*, "minor disputes." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 304 (1989); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). As this Court explained in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added):

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing *effective and efficient remedies* for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. . . . The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. . . . Congress considered it *essential* to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.

Federal courts are not entirely removed from the Act's minor dispute resolution processes, however, for Congress provided the district courts with jurisdiction to review the *final* actions of the adjustment boards upon petition by a party to the dispute. 28 U.S.C. § 1337(a), 45 U.S.C. §§ 153 First(p) and 153 First(q). That review is not *de novo*, but rather is limited to three specific grounds for having the Board's action set aside: (1) failure of the Board "to comply with the requirements of this Act[;]" (2) "failure of the [Board's] order to conform, or confine itself, to matters within the scope of the [Board's] . . . jurisdiction[;]" and (3) "for fraud or corruption by a member of the [Board] . . . making the order." 45 U.S.C. § 153 First(q). *See, Union Pacific R.R. v. Sheehan*, 439 U.S. at 93-95. Until the adjustment board acts, however, federal courts do not have jurisdiction to prevent the board from exercising its jurisdiction. *E.g., Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955); 29 U.S.C. §§ 101, 107.

At the same time that Congress provided for the compulsory arbitration of minor disputes, it addressed a problem that rail labor had experienced under the 1926 Act in enforcing the principle in that Act that employees shall have the "complete" freedom of association to select their collective bargaining representative free from car-

rier interference. *See, Hearings on H.R. 7650, Before House Committee On Interstate And Foreign Commerce*, 73rd Cong., 2d Sess. at 78-80 (1934). Part of the remedy that rail labor sought from Congress in 1934 was a method to determine who the majority of a craft or class of employees had in fact selected as the representative of that craft or class. Along with Commissioner Joseph B. Eastman,[4] rail labor urged Congress to give that authority to the Mediation Board. Congress accepted that request and charged the NMB with the responsibility, "upon request of either party to the dispute," to investigate a dispute "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act . . . ." 45 U.S.C. § 152 Ninth.

While the NMB has the authority under Section 2 Ninth to determine which employees may participate in the selection of the craft's representative, the Board's role under that statute "is more the function of a referee." *Switchmen's Union v. NMB*, 320 U.S. 297, 304 (1943). As this Court observed in *Switchmen's Union*, the NMB makes no "order" under Section 2 Ninth. *Id.* "Under this Act Congress did not give the Board discretion to take or withhold action, to grant or to deny relief. It gave it no enforcement functions. It was to find the fact and then cease." 320 U.S. at 305. That finding of fact is unreviewable by the courts. *Id.* Again, as this Court observed in *Switchmen's Union*, 320 U.S. at 306:

> When Congress in § 3 and in § 9 [of the Act, 45 U.S.C. §§ 153, 159] provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And

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[4] Commissioner Eastman was a member of the Interstate Commerce Commission and the Federal Railroad Coordinator. This Court has recognized that Commissioner Eastman was "one of the weightiest voices before Congress on railroad matters . . . ." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954).

> the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality it denied administrative action under the other sections of the Act.

Generally, there is no problem in distinguishing between a dispute arising out of the interpretation or application of a contract and a dispute among employees as to who is there duly designated collective bargaining representative. However, the line of demarcation between these disputes is less clear when jurisdictional/scope disputes are involved. *See, Hearings on H.R. 7650* at 57-59, 79-80. But again, there should be no confusion because, if the underlying dispute is one over whether certain employees may participate in the vote to select the representative of the craft, the statute makes it clear that the NMB is to make that determination. 45 U.S.C. § 152 Ninth. That jurisdiction lies with the NMB even if one of the parties to such a dispute relies upon a contract to assert a right to have certain employees included in the craft for voting purposes. *See, In re Chicago & North Western Ry.—Yardmen and Switchmen*, 1 N.M.B. Det. 130 (1938). On the other hand, if the underlying dispute is whether the *contract* between the carrier and the collective bargaining representative requires the carrier to assign certain *work* to employees covered by that agreement, then the dispute is one involving the interpretation of an agreement and is within the exclusive jurisdiction of the adjustment boards. *E.g., Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966); *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950); *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946); *In re Chicago & North Western Ry.—Yardmen & Switchmen*, 1 N.M.B. Det. at 135-38. The true nature of the dispute, and not clever lawyering, should determine whether the NRAB or the NMB has jurisdiction over the controversy.

As this case exemplifies, it is important to the orderly administration of the Act that jurisdiction/scope disputes arising out of the interpretation of agreements not be shunted off to an agency that has no power to consider the underlying controversy, for the end result in such a situation will be that the dispute remains unresolved and simply festers. Unfortunately, however, this case does not stand alone, for in recent years carriers subject to the Act, both railroads and airlines, have asserted that contractual jurisdictional disputes are within the jurisdiction of the NMB because the employees who might be affected by an adverse interpretation of the contract "should be allowed the opportunity to determine whether they want to be represented by the union." Pet. App. at 10a. That argument was accepted here, even though, *amicus* RLEA submits, the carriers do not have standing to raise the representational rights of their employees;[5] it has also been accepted by several other courts. *Compare, ALPA v. Texas International Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), *with, ALPA v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987). Although some courts have recognized that carriers often paint with too broad a brush when they raise the "representation dispute" claim, *AFA v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), other courts have allowed the carriers to expand that concept to include far more than disputes "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act . . . ." 45 U.S.C. § 152 Ninth. *See, RLEA v. Wheeling & Lake Erie Ry.*, 914 F.2d 53 (4th Cir. 1990).

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[5] As this Court has noted before: "To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end [of industrial peace], it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), *quoted in Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 50 n.16 (1987).

Amicus RLEA respectfully submits that the proper interpretation of "representation" disputes is too important to the orderly administration of the Railway Labor Act to leave in doubt. Indeed, employees and carriers must know whether Congress intended contractual rights to be unenforceable as "representation disputes," for there is no sense in entering into a contract and giving up certain rights in exchange for the new ones if the new rights are not capable of being enforced.

Moreover, the rail industry must know whether the adjustment board process may be sidetracked as occurred in this case. Rail labor agreed to forego its right to exercise self-help over minor disputes in exchange for the NRAB with its promise of a quick, orderly and binding resolution of minor disputes. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). Congress intended that agency to provide such a remedy, and, as this Court stated in *Union Pacific R.R. v. Sheehan*, 439 U.S. at 94, it "considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." However, according to the lower courts in this case, there is an exception to Congress' carefully crafted scheme that permits a court to *enjoin* one party to a dispute from invoking the NRAB's jurisdiction. This Court has in the past refused to permit such an interference with the orderly functioning of the Act (*see, Whitehouse v. Illinois Central R.R., supra*) and it is clearly important to the rail industry to know if there is now an exception to that prohibition.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS DECISION SINCE THE APPELLATE COURT HAS DECIDED IMPORTANT ISSUES OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS BY THIS COURT INSTRUCTING FEDERAL COURTS NOT TO INTERFERE WITH THE ADJUSTMENT BOARD PROCESS

This Court has previously instructed the federal courts that they should not interfere with the adjustment board

processes, for Congress has given those boards exclusive jurisdiction over contract interpretation issues and has made the orders of those tribunals "final and binding," subject only to limited review in the federal courts. 45 U.S.C. §§ 153 First(m), (p) and (q). *See, Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950). Indeed, in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), this Court concluded that federal courts should not intrude into the adjustment board process and enjoin those procedeings because there can be no showing of irreparable harm. This is so because Congress has provided for judicial review of such agency action *after* the administrative process is concluded and it is speculative to assume that the movant will even need to seek such review. 349 U.S. at 373-74. That ruling, *amicus* RLEA submits, means that federal courts lack jurisdiction to enjoin a party from invoking the NRAB's jurisdiction since Sections 1 and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 107, deprive federal courts of jurisdiction to issue injunctions in labor disputes where, as here, the complainant can not show that it will be harmed irreparably if the injunction is not issued.

Nevertheless, in this case the appellate court affirmed the injunction that required the ATDA to withdraw its claim before the NRAB, because the court of appeals concluded that this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), justified judicial intervention where the administrative agency "would be exceeding its statutory authority in considering the Union's claim." Pet. App. at 12a. That decision by the court of appeals was made more than a month before this Court decided *Board of Governors v. MCorp Financial, Inc.*, Nos. 90-913 and 90-914, decided December 3, 1991, which rejected an analogous, expansive reading of *Leedom v. Kyne*.

In *MCorp* this Court explained that "central to our decision in *Kyne* was the fact that the Board's [*i.e.*, the NLRB] interpretation of the Act would *wholly* deprive the union of a meaningful and adequate means of vindi-

cating its statutory rights." 60 U.S.L.W. at 4008 (emphasis added). This Court also stated in *MCorp* that another reason why *Kyne* should not be read expansively was the fact that *Kyne* "stands for the familiar proposition that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'" *Id.* at 4008-09, *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

MCorp, *amicus* RLEA respectfully submits, shows that the Fourth Circuit's reading of *Kyne* is incorrect. First, the Railway Labor Act gives a party to an NRAB proceeding the right to seek judicial review once that proceeding has been concluded *if* that party believes it has been injured by an act of that Board in excess of its jurisdiction. Thus, premature judicial review under *Kyne* is not necessary to vindicate respondent's statutory rights since those rights are protected by Sections 153 First(p) and (q). And second, since this Court has previously concluded that judicial review of NRAB actions should not occur until *after* the Board has acted, *e.g.*, *Whitehouse*, 349 U.S. at 373-74, and Congress did not disturb that ruling when it amended the Act in 1966, modifying the manner in which NRAB orders could be reviewed by the federal courts (Pub. L. No. 89-456, 80 Stat. 208, 209 (1966)), it is clear that Congress did not intend to give the federal courts jurisdiction to enjoin NRAB proceedings, notwithstanding Section 7 of the Norris-LaGuardia Act.

Since the court of appeals did not have the benefit of this Court's decision in *MCorp* before it issued its decision in this case, *amicus* RLEA respectfully submits that this Court should grant the petition, summarily vacate the judgment of the court of appeals and remand with instructions to reconsider in light of *MCorp*.

III. THIS COURT SHOULD REVIEW THE COURT OF APPEALS DECISION SINCE THE APPELLATE COURT HAS IGNORED EARLIER DECISIONS BY THIS COURT SHOWING THAT CONTRACTUALLY BASED JURISDICTIONAL CLAIMS ARE DISPUTES WITHIN THE EXCLUSIVE JURISDICTION OF THE NRAB

As *amicus* RLEA has shown above, the court of appeals has decided important issues of federal law concerning the distinction between "representation" and "minor" disputes that impermissibly narrowed the scope of disputes that employees may present to the Act's adjustment boards. Instead, the courts below have relegated rail labor to the NMB, an administrative agency that has no jurisdiction to interpret the collective bargaining agreement that petitioner ATDA asserts gives it the right to have the disputed *work* investigated and properly classified. Moreover, since there is no dispute among the dispatchers as to who represents them, there is no dispute over which the NMB may exercise jurisdiction under Section 2 Ninth of the Act. In short, the courts below have relegated the union's contract based claim to a forum which has no power to resolve it.

This treatment of "jurisdictional/scope" disputes, which are based on a claimed contractual right and do not involve the question of who represents the craft or class, is, as *amicus* noted above, inconsistent with the earlier decisions of this Court in *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966); *Whitehouse v. Illinois Central R.R., supra; Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950); and *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), for each of those cases involved jurisdictional/scope disputes that were considered to be within the exclusive jurisdiction of the NRAB. The only distinction between the ATDA's underlying claim in this case and the claims at issue in the above cases, is that here the employees who are performing the work that the ATDA claims is its work are unrepresented, while in

each of the above cases another union was involved. That distinction, however, should have no bearing on the proper classification of this dispute as being within the NRAB's or NMB's jurisdiction.

If this Court does not summarily reverse because of *MCorp*, it should nevertheless review the ruling below because of the manner in which the court of appeals' decision is inconsistent with *Pitney* and its progeny.

CONCLUSION

Amicus RLEA submits that the petition should be granted.

Respectfully submitted,

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APPENDIX A

Organizations Whose Chief Executive Officers
Are Railway Labor Executives' Association Members

American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Hotel Employees and Restaurant Employees
International Union;
International Brotherhood of Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Seafarers International Union of North America;
Sheet Metal Workers' International Association; and
United Transportation Union.